

TRIAL OF A CRIMINAL TAX CASE 1

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1 This trial outline was originally developed by Charles J. Alexander, former Special Litigation Counsel to the Criminal Enforcement Sections of the Tax Division. This outline has been updated to include recent case law where appropriate.

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TRIAL OF A CRIMINAL TAX CASE

GENERAL PRINCIPLES

1. Not a -- "what happened next officer" case
2. Preparation is essential -- organization is the key
3. Ultimate aim -- to make the case interesting and obvious
4. Three C's of a lawsuit: Comfort, Confidence, and Control

OPENING SCENE

1. DOJ letter -- authorization of prosecution or an investigation
2. Criminal Reference Letter (CRL) -- IRS recommendation and tax computations
3. Prosecution Memorandum -- DOJ analysis of case
4. Statements of the defendant
5. Special Agent's report (SAR) -- agent's evidence
6. Exhibits -- One volume to several boxes of documents

FIRST STEP TO TRIAL

1. Read (don't study) Nos. 1-5 above in the order listed
2. Get a stomach feel for what happened
3. Find a theme song as soon as you can:
 - Tax deductions for sale
 - The man who had a nest egg
 - Playing is more fun than paying
 - Angels don't conspire
4. Talk to the agents:
 - Mechanical details will come later
 - What is the case really about?
 - What are the weaknesses in the case? -- they are there
 - Are there serious proof problems?
 - What is the likely defense?

FOURTEEN PREPARATION STEPS

1. Arrange for assistance of IRS agents -- including summary expert
2. Set up pleadings, opening statement, and argument folders
3. Set up witness folder for each witness - place statements, affidavits, etc. of witness in folder
4. Set up exhibit folders - place each exhibit in numbered folder
5. Pre-mark exhibits - make up exhibit list as you go
6. Prepare witness outlines
7. Prepare tentative order of proof as you go
8. Issue subpoenas
9. Interview witnesses
10. Prepare trial brief (earlier, if possible)
11. Prepare jury instructions
12. Turn over discovery material
13. Prepare opening statement
14. Pray for more time

PLEADINGS, OPENING STATEMENT, LEGAL AND ARGUMENT FOLDERS

1. Set up folders at the onset
2. Use designated color in labels and stick to same color, *e.g.*, Pleadings - brown, Legal - blue, Opening and Argument Folders - green
3. Make notes in opening and argument folders from day one

WITNESS FOLDERS -- GENERALLY

1. Trials proceed through witnesses
2. No T.V. flashbacks so entire story must be told
3. Make a separate trial folder for each witness -- material for use at trial - including witnesses you may not call
4. Some witnesses will require several folders
5. Make a second set of folders for each witness -- backup material only

6. Make third set of folders for each witness -- material to give defense, eg. *Jencks Act* statements, *Brady* material
7. Use colors to distinguish different sets of witness folders

WITNESS FOLDERS -- MECHANICS

1. Be fussy on style of folders
2. Choose a style and then make sure every folder is the same
3. Name of witness on each folder -- last, first name, middle initial
4. Block print with marking pen or typed labels
5. Always print every name in same color and at same position on folder - left, right or center of folder
6. Use institutional name not witness name when the entity is the real witness

Example: John Smith, trust officer, will introduce bank records of First National Bank

Folder will be: FIRST NATIONAL BANK

If you want witness name -- then

Folder will be: FIRST NATIONAL BANK
(John Smith, Trust Officer)

7. List Exhibits for each witness on flap of witness' folder, *e.g.*

SMITH, JAMES A.
(18) (26) (48)

8. Defendant -- separate trial folder for each defendant
9. Place each witness folder in accordion-type folder can then have separate folders for a witness grouped in one place -- *Example*:

Accordion folder can contain separate witness folders with outline, etc. separate folder for statements of witness where voluminous, etc.
10. Arrange witness folders in alphabetical order -- including folder for defendant -- and keep them that way

WITNESS FOLDERS -- CONTENTS

1. Outline of anticipated testimony for use in examination
2. Original of all statements made by witness, arranged chronologically -- earliest date on top
3. Copies of exhibits for witnesses:
 - A. Can place *extra* copy of exhibit in witness folder
 - B. Better procedure is to cut up extra copy of exhibit and include in witness outline any portion of exhibit important to testimony
 - C. Reference to the numbers of the exhibits in witness outline
 - D. Rely on your copy of exhibit when examining the witness at trial
4. Cross reference sheet in each witness folder to related witnesses, documents, etc.
5. Reference to pertinent legal memo or copy of memo
6. Anything you will need to examine witness, but limit file to needed material
7. Basic witness folder used to examine the witness should be clean and easy to manage

WITNESS FOLDER -- DEFENDANT

1. Original of all statements made by defendant arranged chronologically -- earliest date on top
2. Backup material considered significant
3. Reference to key exhibits
4. Notes made before and during trial for cross examination
5. Cross reference sheet to exhibits, witnesses, legal memoranda, etc.

WITNESS FOLDER -- AGENT

1. Generally -- same material as any witness -- *see* above
2. Original of Special Agent's Report (SAR)
3. *Copy*(not original) of any statements of defendant taken or witnessed by agent; original goes in defendant's folder
4. Schedules prepared by agent -- separate folder for schedules may be necessary; file in accordion folder for witness

DOCUMENTS -- ALWAYS IN A TAX CASE

1. Stipulated -- Authenticity, Admissibility, Factual
2. Private documents
3. Business records
4. Public -- official documents
5. Self-authenticating documents
6. Summaries and schedules

CLASSIFICATION OF DOCUMENTS

1. Originals
2. Duplicates
3. Certified copies
4. Copies

ORIGINAL -- DEFINITION

Rule 1001(3), Fed. R. Evid.

1. What you have always known as an original.
2. Any counterpart intended as an original -- *Examples*:
 - A. Contract executed in duplicate, triplicate, or any number of times -- all are originals
 - B. Carbon copies of Master Charge sales slips properly admitted as originals

***United States v. Rangel* 585 F.2d 344, 346 (8th Cir. 1978)**
3. *Accurate printout of data stored in a computer is an original* --
Rule 1001(3)
4. If you have an original, you can forget about rules as to the use of duplicates, or copies, or secondary evidence.

**BEST EVIDENCE RULE --
REQUIREMENT OF ORIGINAL
ORIGINAL WRITING RULE
Rule 1002, Fed. R. Evid.**

1. *To prove the content of a writing*, recording or photograph, the original writing, recording or photograph is required, *except as otherwise provided in these rules or by Act of Congress.*
2. Original only required where event is to be proved via a document -- contents or terms of a writing are sought to be proved.

United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

3. An event may be proved by non-documentary evidence even though a written record was made where contents are not sought to be proved.
 - A. *Example*: prove payment made for furniture by testimony of witness who bought furniture -- not necessary to produce receipt or books and records
 - B. Point -- transaction exists independent of any document
 - C. See Adv. Comm. Note to Rule 1002
4. BUT when transaction necessarily involves a document such as a deed or contract then must produce original document *or its equivalent*.
5. Practical matter -- under the rules duplicates are used more often than original.

**DUPLICATE -- DEFINITION
Rule 1001(4), Fed. R. Evid.**

1. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduces the original.
2. *BUT* does not include handwritten or other manual copies such as typed copies.
3. A handwritten or typed copy would be just that -- a copy, not a duplicate.
4. *Example*: A typed copy of a letter is a copy; a xerox copy or a photostat is a duplicate.
5. Important because duplicates are given the same status as originals under the rules -- except in some instances. Copies are not.

ADMISSIBILITY OF DUPLICATES -- PRIVATE DOCUMENTS

Rule 1003, Fed. R. Evid.

1. A duplicate is *admissible to the same extent as an original* unless (1) a *genuine question* is raised as to the authenticity of the original or (2) in the circumstances it would be *unfair to admit* the duplicate in lieu of the original.
2. A key rule that recognizes a xerox world and the practical fact that in most situations a duplicate is as good as an original.
3. Simply stated a xerox copy, photostat, microfilm, etc. print of a document is admissible the same as an original *unless there is a genuine question as to the authenticity of the original; or it is unfair to admit a copy.*
4. That a duplicate is presumptively admissible is the approach unless a real question is raised as to the authenticity of the original or the fairness of using a copy.

United States v. Bakhtiar, 994 F.2d 970, 979 (2d Cir. 1993) (failure to produce original counterfeit bank checks did not deprive defendants of a fair trial)

United States v. Rodriguez, 524 F.2d 485, 487 (5th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976) -- xerox copy of vehicle certificate of title made by agent admitted but note defendant never denied ownership of vehicle

CTS Corp. v. Piher Intern. Corp., 527 F.2d 95, 104 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976) -- carbon copies admitted

United States v. Gerhart, 538 F.2d 807, 810 n.4 (8th Cir. 1976) -- photocopy of a photocopy of a bank check admitted as a duplicate

United States v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977) -- xerox copy of insurance certification admitted as a duplicate

5. Without proper foundation to authenticate, however, a duplicate may be inadmissible.

Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182, 1187 (N.D. Cal. 1973).

6. BUT -- if no stipulation -- must present testimony that the copy is an accurate reproduction of the original, Rule 1001(4), Fed. R. Evid.
7. Burden is on party challenging use of duplicate.

United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980) -- burden on party opposing duplicate

United States v. Germany, 762 F.2d 929, 938 (11th Cir. 1985) -- photocopy of a check in lieu of original introduced by government, burden of challenging photocopy rested on defendant

8. Best evidence rule not applicable, not necessary to explain absence of original to come under Rule 1003; absence of original's coloring in duplicate is no bar to admissibility; *i.e.*, xerox copy:

United States v. Enstam, 622 F.2d 857, 866 (5th Cir. 1980, *cert. denied*, 450 U.S. 912 (1981))

United States v. Wagoner, 713 F.2d 1371, 1377 (8th Cir. 1983)

9. Original should sometimes be used even if a duplicate is technically admissible.

Key points:

- Obtain and put original in evidence, *e.g.* an original check for \$100,000 is far more real than a xerox copy
- Originals generally have more jury appeal -- copies do not pick up colors, do not look "real"
- Criminal Tax Cases: original returns should always be in the courtroom even if a certified copy or a testified to copy is put in evidence
- Original returns -- if admitted, move to substitute copies

10. Admissibility of "duplicates" of public records is governed by Rule 1005 and *not* Rule 1003, Fed. R. Evid.

PUBLIC DOCUMENTS

Rule 1005, Fed. R. Evid.

1. Public records -- the contents of official records and recorded documents authorized to be recorded and actually recorded or filed, *e.g.*, government records, deeds, mortgages, and other documents filed in a county recorder's office, may be proved by copy, certified in accordance with Rule 902 or testified to as correct by a witness who has compared it with the original.
2. A document authorized to be recorded or filed is required to be filed by statute or is customarily recorded in practice.

Amoco Production Co. v. United States, 619 F.2d 1383, 1390 (10th Cir. 1980) (original deed returned to parties after recording is not a public record)
3. Duplicates of private records come under Rule 1003 and are subject to challenge as being unfair to use instead of originals.
4. Public records come under Rule 1005 and issue is *not* available as to whether it is fair to use a certified copy of a public record.

5. Public records are also *not* subject to secondary evidence requirements (Rule 1004) -- makes no difference whether the original is available or not.

STIPULATIONS

1. Can apply to any document, *e.g.*, letters, schedules, affidavits, etc.
2. Authenticity stipulation - no foundation required, copies can be used -- does not say they are admissible.
3. Admissibility -- agreement that document can go in to evidence.
4. Factual -- go to ultimate fact, *e.g.*, item in net worth, bank account balance, cost of stock, etc.
5. Consider: Discovery inevitable so volunteer stipulations on an exchange basis or at least in exchange for authenticity.
6. *Government discovery*: Rule 16(b)(1), Fed R. Crim. P. Government gets discovery if defense is given discovery under Rule 16(a)(1)(C) or (D). As of December 1, 1993, the government is entitled to discovery if defense is given discovery under Rule 16(a)(1)(E).

STIPULATIONS -- CONDITIONS

1. Affidavits, letters, etc. - same as if witness called.
2. Reserve right to call witness, explain background.
3. No stipulation as to willfulness.
4. Have *both* defense counsel and defendant sign stipulation.

ORGANIZING EXHIBITS

1. Foregoing principles determine form of exhibit that can be used.
2. Review exhibits - do you have foundation for rule on which you rely?

PRE-MARK EXHIBITS

1. Voluminous exhibits -- *always pre-mark*.
2. See Judge's courtroom clerk -- first place to go.
3. Explain system to be used -- obtain exhibit stickers.
4. Mount exhibits -- effective and simple to do.

EXHIBIT LIST -- ESSENTIAL

1. Many ways to pre-mark -- depends on case, court and your style.
2. Exhibit list -- should always have one.
3. Suggest exhibit list in chart form containing the following columns:
 - Exhibit No.
 - Description of Exhibit
 - Identified
 - Admitted/Stipulated *
 - Witness (optional on copies to court and to defense)

4. *Example:*

<i>Ex. No.</i>	<i>Description</i>	<i>Id.</i>	<i>Adm/Stip*</i>	<i>Witness</i>
1.	Adams, 1990 Income Tax Return	4/8/93	4/8/93	Certified
2.	Deed: Brown to Smith		4/6/93*	Brown
3.	\$10,000 check from Carter to Jones dated 4/6/90	4/7/93	4/12/93	Carter

5. Witness column will lead you to source.
6. Agent or associate counsel maintains exhibit book at trial.
7. Copy of Exhibit list to court, courtroom clerk, probably defense, and reporter.

PRE-MARKING PROCEDURE

1. Visualize presentation as chronological or logical -- usually chronological with logical subdivisions.
2. Step No. 1 is not essential but is preferred if time permits - not fixed in concrete order of proof.
3. Review witness statements, exhibits and other material and place sticker with a number on each exhibit for the witness.
4. Make exhibit list out as you go, *i.e.* list number, description of exhibit and witness to introduce.

5. Place each numbered exhibit in a separate exhibit folder:
 - Separate Folder: EXHIBIT 1
 - Separate Folder: EXHIBIT 2
 - Separate Folder: EXHIBIT 3
6. Helpful to number in expected order of offering exhibits, but not necessary -- waste of time to agonize over which exhibit will be first, second, etc.
7. Use a color code and stick with it - if folder for EXHIBIT 1 is labeled in green, then all exhibit folders should be labeled in green.
8. Recommended: *Keep sets of exhibits in numerical order*
 - A. Arranging and keeping exhibits in numerical order gives flexibility and control
 - B. Numbers control and exhibit is easy to locate
 - C. Extra copy can always be made and placed in appropriate witness folder
9. *Make at least five sets of numbered exhibits:*
 - 1 set for admission into evidence
 - 1 set for use by you at trial
 - 1 work set to cut up and incorporate in witness outlines, or to use as needed
 - 1 set for each defendant -- probably required
 - 1 set for the Judge -- check with local practice
10. *Procedure:* first number court set of exhibits with stickers and then xerox this set for additional copies needed -- in this way all sets will reflect the number assigned to an exhibit.

WITNESS OUTLINES

1. After numbering exhibits -- prepare witness outlines.
2. Tools -- all pertinent statements and exhibits, scissors and scotch tape.
3. Style that gives you the most comfort is the one to use.
4. Writing out questions and answers:
 - A. Not recommended for the long run
 - B. *Exception* -- may want to do this for a hypothetical question or important big questions
5. Topical outline form:
 - A. Advantage of flexibility and control of examination

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- B. Can be as detailed as you wish -- but key detail to each topic you are covering
 - C. Cut and scotch tape in outline appropriate portions of statements obtained from witness
6. Outline goes in witness folder.

ABBREVIATED SAMPLE OUTLINE

Dr. JOHN SMITH
Boston, Massachusetts
Investor

SUMMARY: 1990 "Invested" \$30,000 (cash), \$120,000 nonrecourse note in defendant's tax shelter; note backdated to 1989

EXHIBITS: 33, 18, 43, 275

BACKGROUND: Doctor -- internist, 10 years, practices in Philadelphia

INVESTOR: Invests in stocks, real estate, shelters
No investor-advisor -- handles it himself

KNOWS DEFENDANT: Met defendant in 1985; bought several shelters from defendant -- movies, records, oil and gas

MOVIE SHELTER PURCHASED:

DEFENDANT CALLED 4/5/90: First contact with defendant, re: movie shelter
Took call at office -- April 5, 1990
Defendant told him about movie shelter for 1989

DEF. DESCRIBED SHELTER TERMS: [Detail conversation -- scotch-tape portion of defendant's statement that describes terms]

DEF. SAID ON 4/5/90 -- COULD TAKE DEDUCTION ON 1989 RETURN: Defendant: "makes no difference that it is 1990"
"Note can be dated in 1989 -- no one will know."

SIGNED BACKDATED NOTE:

EX. 18 Gave \$250,000 note to defendant
Signed note at defendant's office, 4/14/90

ORDER OF PROOF

1. Try to arrange case in chronological order - mix strong and weak witnesses.
2. ***Start strong, finish strong.***
3. Devise form so you have tentative order of proof as you go.
4. Use separate form (*e.g.*, file cards) for each witness -- this way you can shuffle order of witnesses until you have final order of proof.

SUBPOENAS

1. Witness trial folders and applicable exhibits can be used to draft subpoenas.
2. Issue subpoenas three to four weeks before return date.
3. List your name and telephone number on subpoena.
4. Have I.R.S. agents serve subpoenas -- they are authorized to do so -- 26 U.S.C. § 7608.
5. Use catch-all phrases but also list specific documents wanted when you can.
6. State on subpoenas -- original documents are to be produced, if you do *not* have the original but do have a copy, then the copy is to be produced.

SUBPOENAS -- LARGE CASE

1. Draft stock phrases for use in numerous subpoenas.
2. Stagger return dates -- can't have 200 witnesses appearing at the same time.
3. Suggested Procedure:
 - A. Do not know precise date witness is going on stand
 - B. Use first day of trial as return date on all subpoenas -- ***BUT***
 - C. Attach letter to subpoena with a telephone notice card. If witness signs and returns card then no appearance is required until called
 - D. Telephone card is to be signed by witness and attached to copy of subpoena returned by process server
 - E. If telephone card is not signed and returned -- must appear on first day of trial and wait until called to the stand
 - F. Telephone card should contain, name of witness, home and business address and telephone numbers
 - G. Telephone cards -- some for one-day telephone notice, two days, three days, etc.

4. Make up telephone card file and have an agent in charge of witness traffic.
5. Arrange for de-briefing session with witness.

JURY MATTERS

1. *Voir dire*, peremptory challenges and alternate jurors, Rule 24, Fed.R.Crim.P.
2. Qualifications, exemptions, manner of drawing, inspection of records, excuses, etc. -- 28 U.S.C. §§ 1861, *et seq.*
3. Jury of less than twelve -- only if both parties stipulate in writing *any time* before verdict and court approves, Rule 23(b), Fed. R. Crim. P.
4. No stipulation - if court finds it necessary to excuse a juror for cause *after the jury has retired*, valid verdict may be returned by the remaining eleven jurors. Rule 23(b), Fed. R. Crim. P.

GOVERNMENT RIGHT TO JURY TRIAL

Rule 23(a), Fed. R. Crim. P.

1. Trial is by jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."
Rule 23(a), Fed. R. Crim. P.
2. Rule 23(a), Fed. R. Crim. P. is constitutional -- defendant can have a bench trial with "the consent of the prosecuting attorney and the trial judge."

Singer v. United States, 380 U.S. 24, 36 (1965)

3. Dicta in *Singer*, 380 U.S. at 37, leaves door open for unique case:

We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would result in the denial to a defendant of an impartial trial
4. At least two district courts have used the *Singer* dicta to deny the government's insistence on trial by a jury:

United States v. Braustein, 474 F. Supp. 1 (N.J. 1979) -- criminal tax case; government petition for mandamus on jury point became moot when all defendants entered guilty pleas

United States v. Panteleakis, 422 F. Supp. 247, 250 (R.I. 1976) -- bench trial ordered -- "the Court finds the government's refusal to grant consent unreasonable and arbitrary."

5. Jury or Not -- considerations -- *see*:

United States v. Moon, 718 F.2d 1210, 1217 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)

United States v. Morlang, 531 F.2d 183, 186 (4th Cir. 1975)

United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983)

SELECTION OF JURORS

1. Secure jury panel list as soon as possible.
2. Check with other assistants, neighbors, friends, etc.
3. I.R.S. is authorized to tell you whether a prospective juror has or has not been the subject of any audit or other tax investigation by the Service, 26 U.S.C. § 6103(h)(5):
 - A. Request *must* be made in writing by an attorney for the Department of Justice or any person who is a party to such proceeding;
 - B. IRS reply must be limited to "yes" or "no" -- no details
4. Draft chart to use during jury selection.
5. Suggested *voir dire* questions include:
 - A. Have you, a close friend, or a relative, had any dealings with the I.R.S.? If yes -- were you satisfied with those dealings?
 - B. Have you studied accounting or law?
 - C. Will those of you who prepare your own tax returns please raise your hand?

OPENING STATEMENT -- LAW

1. Purpose "is to state what evidence will be presented to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument."

United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991).

"To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct."

United States v. Dinitz, 424 U.S. 600, 612, (1976) (Burger, C.J. concurring)

2. Scope and extent of an opening is within the control of the trial court
3. Defense counsel can obtain permission to reserve opening until the government has rested:

Karikas v. United States, 296 F.2d 434, 438 (D.C. Cir. 1961), *cert. denied*, 372 U.S. 919 (1963)

4. BUT timing and making of opening statements is within the discretion of the trial judge.

United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

OPENING STATEMENT -- Pointers

1. "What I say, or defense attorney says, is not evidence" - preview of case
2. Never say -- "I believe", or "the government believes"
3. Can say -- "I suggest that" or "I submit"
4. Explain elements of crime -- briefly
5. Explain method of proof - don't use technical language
6. Point out necessity of documents
7. Paper may seem confusing - probably boring
8. See some exhibits during trial - all in jury room
9. Summary expert will put documents together for you
10. TELL JURY A STORY
11. Never -- Witness Jones or Smith will tell you . . .

Rather -- Jones paid the defendant \$10,000 for lumber; Smith gave the bar receipts to the defendant

12. Chronological approach -- as much as possible
13. Be strong and definite but conservative -- otherwise you'll be sorry later
14. *Never, never, never* go beyond the evidence *you have*:

United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J. concurring)

15. Hit highlights, eliminate details
16. Get pre-trial, pre-opening ruling on any "hot" evidence that you want to cover
17. Conclusion: "will ask you for a verdict of guilty"

DOCUMENTS AT TRIAL GENERALLY

1. Many documents -- necessary for case but *no great persuasion weight*.
2. General rule -- no testimony or reference to contents of a document until it is admitted.
3. Lay foundation and move admission quickly is normally best.
4. Routine documents - get it over with, lead where possible.
5. Documents with color - slow down, labor foundation somewhat.

VOIR DIRE

1. Challenge to admissibility of document.
2. Discretionary with court to permit.
3. Preliminary examination of witness on apparent foundation.
4. *Voir dire* prior to ruling on admissibility.
5. Document is not what it appears to be, incompetent witness, etc.
6. No proper foundation for admission of document.
7. Note: *Only goes to matters that relate to foundation*.
8. *Should not be used to cross-examine witness on other matters*.

BUT defense will often seek to cross-examine under the guise of voir dire

9. *Do not* ask for voir dire unless there is a good chance the exhibit will be excluded

OBJECTIONS -- RULINGS ON EVIDENCE

Rule 103, Fed. R. Evid.

1. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
2. A timely objection or motion to strike appears of record, "stating the specific ground of objection, if the specific ground was not apparent from the context." Rule 103(a)(1), Fed. R. Evid.
3. "[I]n the absence of a specific objection on foundation grounds reversal is not required."

United States v. Wagoner, 713 F.2d 1371, 1377 (8th Cir. 1983)

***INADMISSIBLE EVIDENCE
SUGGESTED TO JURY***

Rule 103(c), Fed. R. Evid.

1. Jury case -- conduct trial so as to "prevent inadmissible evidence from being suggested to jury by any means." Rule 103(c), Fed. R. Evid.
2. Inadmissible evidence suggested by "any means such as *making statements* or offers of proof or *asking questions in the hearing of the jury*." Rule 103(c), Fed. R. Evid. (Emphasis supplied).

See United States v. Birges, 723 F.2d 666, 673 (9th Cir.), *cert. denied*, 104 S. Ct. 1926 (1984).
3. A rule that is often overlooked that can be most helpful when a party (or even the court) steps out of line.

INCOME TAX RETURNS

1. Usually first exhibit offered.
2. Can offer later but should be a good reason for delay in offer.
3. Return can be offered via witness or by offering certified copy.
4. Original returns should always be in the courtroom.
5. If original return is admitted, make motion to substitute a copy for original.

INCOME TAX RETURNS -- WITNESS

1. Witness - Representative of Internal Revenue Service Center.
2. Arrange for witness well in advance of trial.
3. Absolutely vital to review proposed testimony with witness.
4. *Foundation: essential to establish that witness is a "reader" and not a tax expert.*
5. Can make return live -- Example:

Q. How much did the defendant report as Capital gains on Schedule D of his 1990 return?

A. There are none reported.

Q. How much did the defendant report as interest income?

A. She reported \$300 in interest from the First National Bank.

INCOME TAX RETURNS -- CERTIFICATION

1. Not necessary to use a witness.
2. Use of reproductions -- 26 U.S.C. § 6103(p)(2)(C):
 - (C) Use of reproductions.--Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, *if properly authenticated, be admissible in evidence* in any judicial or administrative proceeding *as if it were the original*, whether or not the original is in existence. (Emphasis supplied)
3. Note -- takes care of authenticity -- *not* admissibility.
4. Certification -- District Directors and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required.
 - A. "Judicial notice shall be taken of any seal prescribed in accordance with this authority" 26 U.S.C. § 7514 (authority to prescribe or modify seals)
 - B. Treas. Reg. § 301.7514-1(c) (26 C.F.R.) (seal for authenticity)
5. Officer who had custody and transferred returns to Records Center can still certify, *e.g.*, return filed with District Director in pre-service center days and transferred to Federal Records Center.
 - A. 44 U.S.C. § 3104 -- Certifications and determinations on transferred documents
6. *Case examples:* prior to Federal Rules of Evidence but principles are still applicable.
 - United States v. Merrick*, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972)
 - Holland v. United States*, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)

AUTHENTICITY VIA WITNESS ROUTE

1. *Repeat:* certification is not exclusive -- can call witness.
2. *Income tax return -- witness:* representative of Service Center or District Director.
3. Witness -- Advantages:
 - A. Can't get live mileage out of document
 - B. Provides explanations, *e.g.*, marks on return made during processing
 - C. Negative questions -- highlight failure to report item on the return
 - D. Return needed quickly in court -- bring in witness, no time to certify

4. Disadvantages:
 - A. Cross-examination problems
 - B. Takes up time in the courtroom
 - C. *Must* prepare witness -- time may be a problem
5. Certify return or other document even if witness used -- insurance.
6. Arrange for substitution of copies -- use copies if possible with originals available.
7. *BUT . . . always have the originals in the courtroom*

INCOME TAX RETURNS -- SIGNATURE -- TRIAL MILEAGE

1. *Self-authenticating*-- "Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic" does not require extrinsic evidence of authenticity.
 - A. Rule 902(10), Fed. R. Evid.
 2. "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."
 - A. 26 U.S.C. § 6064
 - B. *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992).
 - C. Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), § 56.15
 - D. Note that section 6064 is not limited to returns, but also applies to a "statement or other document."
3. Not conclusive -- still a jury question:
 - United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)
 - United States v. Wainwright*, 413 F.2d 796, 802 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)
4. *Signature on return* -- inference proper that defendant had knowledge of contents of return:
 - United States v. Romanow*, 509 F.2d 26, 27 (1st Cir. 1975)
 - United States v. Ruffin*, 575 F.2d 346, 354-55 (2d Cir. 1978)
 - United States v. Mohnney*, 949 F.2d 1397, 1407 (6th Cir. 1991)

United States v. Gaines, 690 F.2d 849, 853-54 (11th Cir. 1982)

5. *Partnership return* -- signed by a partner, then "prima facie evidence that partner is authorized to sign the return on behalf of the partnership."
 - A. 26 U.S.C. § 6063 -- signing of partnership returns
6. *Corporate return* -- person's signature on return is prima facie evidence that individual was authorized to sign on behalf of the corporation:
 - A. 26 U.S.C. § 6062 -- signing of corporate returns
7. *Unsigned return* -- can still be a section 7201 charge:
 - A. *Moore v. United States*, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
 - B. No section 7206(1) charge -- subscribing is an element of offense

BUSINESS RECORDS

"RECORDS OF REGULARLY CONDUCTED ACTIVITY"

Rule 803(6), Fed. R. Evid.

1. "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . . all as shown by the testimony of the custodian or other qualified witness," unless the circumstances indicate lack of trustworthiness.
2. Basic statute for admission of business records -- derived from 28 U.S.C. § 1732:
 - A. Advisory Comm. Note to Rule 803(6), 51 F.R.D. 315, 426 (1971)
 - B. Section 1732 now deals with the admissibility of *copies* of business records or government records made in the regular course of business where the original has been destroyed in the regular course of business
 - C. Note that section 1732 provides for use of an enlargement of a copy

3. If record admitted as a business record, then test on appeal is limited to a review for abuse of discretion:

Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980)

4. Eliminates need of calling a witness to the transaction even if witness is available.

TERM BUSINESS -- "CALLING OF EVERY KIND"

Rule 803(b), Fed. R. Evid.

1. Expressly defined to include "business, institution, association, profession, occupation, and calling of every kind, *whether or not conducted for profit.*"
2. Running accounts of illicit enterprises are business records:

United States v. Cooper, 868 F.2d 1505 (6th Cir.), *cert. denied*, 490 U.S. 1094 (1989) (log book of forged prescriptions kept in "regular course" of business was admissible)

United States v. Foster, 711 F.2d 871 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (ledger containing running accounts of illegal drug dealing is admissible if kept in "regular course" of the business activity)

3. See ***United States v. Diez***, 515 F.2d 892, 899 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976):
 - A. Diez and Palori convicted of conspiracy and Palori convicted of four counts of evasion
 - B. Both arranged for income from real estate transactions to be improperly reported
 - C. Case has good examples of business records, accountant's records, lawyer's records, and a title company's records
5. *Foreign business records*: Rule 803(6) applies: ***United States v. Sand***, 541 F.2d 1370, 1376-77 (9th Cir. 1976), *cert. denied sub nom. Scully v. United States*, 429 U.S. 1103 (1977) (Swiss bank records)

**"A MEMORANDUM, REPORT, RECORD,
OR DATA COMPILATION, IN ANY FORM"**

Rule 803(6), Fed. R. Evid.

1. Not limited to books of account:

United States v. McPartlin, 595 F.2d 1321, 1347 (7th Cir.), (Sprecher, J., concurring), *cert. denied*, 444 U.S. 833 (1979) (desk calendar and appointment diaries)

2. Note that reports are included -- but must meet all tests same as any other document, *i.e.*, prepared in regular course of business activity, etc.
3. *Data compilation* is used to include any means of storing information such as computer storage of information, *i.e.*, "computer language" used.
4. *Record can be in any form* -- as long as made in the regular course of the business activity.
 - A. Pen, pencil, printed, written, on record paper, notebook paper -- makes no difference
 - B. See *United States v. Prevatt*, 526 F.2d 400, 403 (5th Cir. 1976) (secretary's notebook)
5. Letter from one party to another in the regular course of business can qualify as a business record

COMPUTER PRINTOUTS

Rule 803(6), Fed. R. Evid.

1. *Computer printouts* are admissible -- but must lay foundation that standard equipment properly operated was used:

United States v. Sanders, 749 F.2d 195, 198 (5th Cir. 1984) -- BUT must meet requirements of Rule 803(6)

United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974), also a case under former 28 U.S.C. § 1732

United States v. Croft, 750 F.2d 1354, 1364 (7th Cir. 1984)

United States v. DeGeorgia, 420 F.2d 889, 893 (9th Cir. 1969)
2. BUT NOT necessary for computer programmer to testify to authenticate computer generated records -- nor is it necessary to call the person who actually prepared the record -- one who has knowledge of record system is sufficient:

United States v. Moore, 923 F.2d 910 (1st Cir. 1991) (computer-generated loan histories in bank fraud case -- not necessary that computers be tested for programming errors before admitting computer records)

United States v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985)
3. Accurate printout of data stored in a computer is an original -- Rule 1001(3), Fed.R.Evid.

BANK MICROFILM ADMISSIBLE

1. *United States v. Kelly*, 349 F.2d 720, 771 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)
2. *Williams v. United States*, 404 F.2d 1372, 1373 (5th Cir. 1968), *cert. denied*, 394 U.S. 992 (1969)
3. *United States v. Keane*, 522 F.2d 534, 557 (7th Cir. 1975)
4. *United States v. Saputski*, 496 F.2d 140, 142 (9th Cir. 1974) -- 28 U.S.C. § 1732(b), now 28 U.S.C. § 1732
5. *Grummons v. Zollinger*, 240 F. Supp 63, 69 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965)
6. Records that can come in under Rule 803(6), IF other tests met:
 - Business records -- payroll records, invoices, ledgers
 - Bank records -- bank statements, loan records, checks, etc.
 - School records, *e.g.*, attendance records
 - Church records, *e.g.*, pledge fund records
 - Prison -- deemed a business, *Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976)
 - Hospitals
 - Civic associations
 - Parent-Teachers associations
 - Little league sports associations
 - Sunday school records of attendance
 - Neighborhood cooperative
7. See P.L. 93-595 Conference Report No. 93-1597, 93rd Cong., 2d Sess. United States Code Congressional & Administrative News (1974), p. 7104

"MADE AT OR NEAR THE TIME"

Rule 803(6), Fed. R. Evid.

1. This is the old requirement that record be made *contemporaneously* or reasonable time thereafter.
2. Not determined by arbitrary or artificial time limits measured by hours or days or even weeks -- depends on nature of information, reliability of source, etc.

Seattle-First National Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976) -- timeliness requirement is satisfied if record is made at "a reasonable time thereafter"
3. Computer printout prepared 11 months after close of year held contemporaneous:

United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973) (case under former 28 U.S.C. § 1732(a))

4. *Issue is*: was data put in computer or recorded contemporaneously?

**"MADE . . . BY, OR FROM INFORMATION TRANSMITTED
BY, A PERSON WITH KNOWLEDGE"**

Rule 803(6), Fed. R. Evid.

1. This refers to source of information, NOT to custodian or sponsor witness.
2. Note that *person making record need not have personal knowledge, i.e.,* information can be transmitted to him by one who has knowledge.
3. Person with knowledge *does not mean that person with knowledge has to be produced*
 - A. Do not even have to identify person with knowledge -- may be unknown

White v. Cessna Aircraft Co., 611 F. Supp. 1049, 1059 (W.D. Mo. 1985)
 - B. Advisory Comm. Note to Rule 803
 - C. Merely have to show regular practice of activity to *base record upon information received from a person with knowledge*
4. Person with knowledge -- AN INFORMANT WITH KNOWLEDGE ACTING IN THE COURSE OF A REGULARLY CONDUCTED ACTIVITY -- someone responsible to the organization on whom reliance is placed:
 - A. S. Report No. 93-1227, 93rd Cong., 2d Sess.
 - B. United States Code Congressional & Administrative News (1974), pp. 7051, 7063

**"MADE" -- CAN ADOPT RECORD
OF ANOTHER**

Rule 803(6), Fed. R. Evid.

1. *Invoices* received by company that were prepared by sending Company -- held admissible on testimony of receiving company -- no testimony by company that prepared invoices, ***United States v. Flom***, 558 F.2d 1179, 1182 (5th Cir. 1977):
 - A. Trustworthiness demonstrated -- then may not be necessary for one who kept record or had supervision over the preparation to testify
 - B. Important concept -- often records received and made record of company in regular course of business but not prepared by receiving company

2. Freight bill admitted upon testimony of receiving company in possession of stolen goods conviction -- freight bill adopted and relied on by receiving company:

United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977)

3. Note information is received from person with knowledge, *i.e.*, sending company doing business with receiving company and both companies check each other
4. Inventory schedule and manufacturer's statement of origin prepared by Ford Motor Company introduced by general manager of Lincoln Mercury Agency to establish car was stolen by the defendant:

United States v. Ullrich, 580 F.2d 765, 771-72 (5th Cir. 1978)

EXAMPLES -- PERSON

WITH KNOWLEDGE

Rule 803(6), Fed. R. Evid.

1. Police report of information obtained by bystander -- officer is acting in regular course of activity, BUT the informant is not.
2. Compare, *United States v. Smith*, 521 F.2d 957, 962 (C.A. D.C. 1975) -- police report held to be a business record and policeman's account of what complaining witness said to him held admissible (by defense not government) when offered to impeach testimony of complaining witness

3. Statements in complaints filed with Post Office by private citizens held admissible:

United States v. Lange, 466 F.2d 1021, 1024 (9th Cir. 1972) (case under former 28 U.S.C. §1732)

4. Envelopes in administrative file admissible to show mailing and date sent to addressees.

United States v. Pent-R Books, Inc., 538 F.2d 519, 528 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977)

**"IF KEPT IN THE COURSE OF A REGULARLY CONDUCTED
BUSINESS ACTIVITY, AND
IF IT WAS THE REGULAR PRACTICE OF THAT BUSINESS
ACTIVITY TO MAKE THE MEMORANDUM, REPORT, RECORD,
OR DATA COMPILATION"**

Rule 803(6), Fed. R. Evid.

1. Standard -- *KEPT* in course of regular business activity and,
2. Standard -- regular practice of business to *make* record

3. Note foundation must be laid on two points:

- A. Record of a regularly conducted activity

- B. Regular practice to make record in issue

United States v. Pelullo, 964 F.2d 193, 200 (3d Cir. 1992)

United States v. Lawrence, 934 F.2d 868, 870 (7th Cir. 1991)

- C. *Example*: Bank loan money -- "regular activity"

4. Accident report by deceased railroad engineer offered by railroad trustees in collision case held *NOT* admissible

Palmer v. Hoffman, 318 U.S. 109 (1943)

- A. Business was railroading -- not making accident report, *i.e.*, not regular course of business to make accident reports

- B. Report was prepared for litigation, NOT railroading

- C. *Motivation*: Not record of routine operations -- goes to motivation of engineer

5. Verified statement by supervisor of market value of stolen trailer made three years after trailer was stolen was not made in course of regularly conducted business practice, but for use at trial and was not a business record for purposes of Rule 803(6)

United States v. Williams, 661 F.2d 528, 530 (5th Cir. 1981)

EXAMPLES - REGULAR PRACTICE TO MAKE RECORD OR REPORT

1. *Notation on records* such as "did not report for work," or initials of teller on bank record, is qualified if made in course of business activity -- otherwise not.
2. *Notation in Selective Service file* -- admissible, ordinary course of business to write "did not report" on Selective Service form:

LaPorte v. United States, 300 F.2d 878, 880 (9th Cir. 1962) (decided under 28 U.S.C. § 1732, but same principles apply)

3. *Tax conviction*: admitted, corporate reports filed with state corporation commission:

United States v. Ragano, 520 F.2d 1191, 1200 (5th Cir. 1975), *cert. denied*, 427 U.S. 905 (1976) (decided under former 28 U.S.C. § 1732(a), but principles are applicable under Federal Rules of Evidence)

4. *Statutory notice of deficiency* -- sent by certified mail and Post Office Form 3877 stating statutory notices for 1959-1961 and 1962 had been sent to defendant and attorney held admissible. ***United States v. Ahrens***, 530 F.2d 781, 784 (8th Cir. 1976) (28 U.S.C. § 1732(a) case, but would now be admissible under Rule 803(6), Fed. R. Evid.).

5. Regular practice -- occasionally *not* followed or errors occasionally made, not enough to take documents out of Rule 803(6):

United States v. McGill, 953 F.2d 10, 15 (1st Cir. 1992)

United States v. Patterson, 644 F.2d 890, 900-01 (1st Cir. 1981)

6. Incomplete record -- Fact ledger was an incomplete record of drug dealings and contained several blank pages and unrelated entries did not render the ledger inadmissible:

United States v. Foster, 711 F.2d 871, 882 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984)

7. *Notation in police report* -- NOT admissible -- "police records are business records" BUT a note on letter of resignation in file *not identified* and not shown to be in regular course of business or contemporaneously made:

United States v. Halperin, 441 F.2d 612, 618 (5th Cir. 1971)

THIRD PARTY DOCUMENTS

1. *Third-party documents* collected in file not enough -- must show that document *made* in regular course of business, *e.g.*, letters received from third parties routinely kept in file not enough:

United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973)

United States v. Yates, 553 F.2d 518, 521 (6th Cir. 1977) -- postscript to letter not admissible, statement outside the scope of the business

Phillips v. United States, 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied sub nom. Walker v. United States*, 384 U.S. 952 (1966) -- BUT admissible for limited purpose of showing defendant knew statements had been made

2. BUT letters can be admissible as business records:

United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)

See also United States v. Flom, 558 F.2d 1179, 1182 (5th Cir. 1977)

United States v. Keane, 522 F.2d 534, 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976)

"ALL AS SHOWN BY THE TESTIMONY OF THE CUSTODIAN OR OTHER QUALIFIED WITNESS" Rule 803(6), Fed. R. Evid.

1. Witness must be able to testify:

- A. Record of regularly conducted activity
 - B. Kept in regular course of business activity
 - C. Regular practice of business to make record
 - D. Record made at or near time of event -- by person with knowledge or information from person with knowledge
2. Can compel custodian of records to identify and authenticate the documents produced for admission into evidence:

In re Custodian of Records of Variety Distributing, 927 F.2d 244, 249 (6th Cir. 1991)

3. *Sponsor with knowledge* would seem to be enough, *i.e.*, not necessarily custodian as such -- "qualified witness" -- *someone in the activity* because of her position or activities has reason to know about the records and business practice of the firm:

United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986) (government agent properly laid the foundation for admitting records -- all that is required is that the witness be familiar with the record keeping system)

4. Business records admitted upon testimony that records "kept under his direction by his assistant in the usual course of business":

United States v. Beathune, 527 F.2d 696, 700 (10th Cir. 1975), *cert. denied*, 425 U.S. 996 (1976)

5. Company records admitted as business records: (1) Transcript of SEC testimony of deceased bookkeeper identifying records and manner of keeping records admissible under Rule 801(d)(2)(D); (2) testimony of two former employees that deceased accountant maintained records; (3) admission of defendant that deceased bookkeeper maintained books; and (4) testimony of CPA that records checked out as accurate

United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983)

PREPARER NOT NECESSARY

1. Witness does *not* have to be preparer; ***DOES NOT EVEN HAVE TO HAVE BEEN AN EMPLOYEE OF COMPANY WHEN RECORD MADE*** as long as witness can testify to the nature of the records:

United States v. McGill, 953 F.2d 10, 14-15 (1st Cir. 1992)

United States v. Lieberman, 637 F.2d 95, 100 (2d Cir. 1980)

United States v. Pellulo, 964 F.2d 193, 201 (3d Cir. 1992) (government agent may provide the foundation where the agent is familiar with the record-keeping system)

United States v. Scallion, 533 F.2d 903, 914-15 (5th Cir. 1976), *cert. denied sub nom. Jenkins v. United States*, 429 U.S. 1079 (1977)

United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975)

United States v. Lawrence, 934 F.2d 868, 870-71 (7th Cir. 1991)

United States v. Pfeiffer, 539 F.2d 668, 670-71 (8th Cir. 1976)

United States v. Woods, 518 F.2d 696, 698 (8th Cir. 1975) (Texaco credit card investigator testified as to Texaco invoice allegedly signed by defendant)

United States v. Bowers, 593 F.2d 376, 380 (10th Cir.), *cert. denied*, 444 U.S. 852 (1979)

2. Not necessary for witness to identify maker of entries as long as foundation is laid as in No. 1 above:

Matador Drilling Co., Inc. v. Post, 662 F.2d 1190, 1199 (5th Cir. 1981)

3. *BUT* -- records inadmissible because witness did not know of own personal knowledge records were kept in office, no testimony that it was practice of business to keep such records, etc.

United States v. Rosenstein, 474 F.2d 705, 709 (2d Cir. 1973) (28 U.S.C. § 1732)

"UNLESS THE SOURCE OF INFORMATION OR THE METHOD OF CIRCUMSTANCES OR PREPARATION INDICATE LACK OF TRUSTWORTHINESS"

Rule 803(6), Fed. R. Evid.

1. *Approach*: Records made in course of regular activity are admissible -- *BUT* subject to exclusion if not trustworthy.
2. Escape clause for excluding records where *motive or accuracy of informant* is subject to question.
3. Court can exclude records, IF source of information or other circumstances make the record suspect.
4. *Example* -- records prepared in anticipation of litigation are suspect and not within Rule 803(6):

Palmer v. Hoffman, 318 U.S. 109, 111 (1943)

United States v. Williams, 661 F.2d 528, 531 (5th Cir. 1981)

Paddack v. Christensen, 745 F.2d 1254, 1258 (9th Cir. 1984)

5. Type of record, how made, motivation in making record, and which party is offering the record all bear on question of trustworthiness and hence admissibility.
6. *However*, once the defendant voluntarily produces business records (*i.e.*, in response to government summonses and subpoenas) and implicitly represents the records to be company records, defendant cannot later complain that documents did not originate from the company:

United States v. Lawrence, 934 F.2d 868, 871 (7th Cir. 1991)

DEFENDANT'S BOOKS AND RECORDS ACCOUNTANT'S WORKPAPERS

1. Prepared by defendant's accountant or bookkeeper.
2. Could be admissible under Rule 803(6) as a business record.
3. Could be admissible as an admission -- statement by an authorized person, under Rule 801(d)(2)(C).
4. *Example*-- Defendant says, talk to my accountant, he can show you the books -- accountant's statements are admissions as to defendant:

United States v. Diez, 515 F.2d 892, 896 n.4 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)

5. Could be admissible as an admission -- statement by agent (bookkeeper) concerning matter within scope of his employment made while still working for defendant -- Rule 801(d)(2)(D):
 - A. Must be matter concerning bookkeeper's duties *and* bookkeeper must still be working for defendant
 - B. Makes no difference that bookkeeper is not authorized to make disclosures.
 - C. Transcript of SEC testimony of deceased bookkeeper, re: keeping company's books and records admissible as an admission under Rule 801(d)(2)(D), Fed.R.Evid.

United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983) (admission through an agent, *i.e.*, bookkeeper for the company)

6. If the accountant-bookkeeper is *NOT* authorized to make a disclosure the statement is *still admissible* as long as the statement is one made within the scope of the witness employment while the witness is still "working" for the defendant, Rule 801(d)(2)(D), Fed. R. Evid.
7. Authorization to speak is *not* a requirement of Rule 801(d)(2)(D):
 - A. Rule 801(d)(2)(C), unlike 801(d)(2)(D), requires that a statement be "by a person authorized by the party to make a statement concerning the subject."
 - B. Rule 801(d)(2)(D), however, says nothing about an agent having authority to make a statement on a particular subject. After an agency is established, Rule 801(d)(2)(D)

requires only that the statement concern "a matter within the scope of the agency or employment, made during the existence of the relationship."

Nekolny v. Painter, 653 F.2d 1164, 1171 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982)

8. *Example*: Bookkeeper who works for the defendant gives an IRS agent a copy of the defendant's records and explains which are personal and which are business expenditures -- both books and statements made to agent are admissible even though not authorized by the defendant

Cf. *United States v. Ojala*, 544 F.2d 940, 945-46 (8th Cir. 1976)

FOREIGN BUSINESS RECORDS

18 U.S.C. § 3505

1. Criminal case -- foreign business record or copy authenticated and admissible if foreign certification attests that:
 - A. Record was made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters
 - B. Record kept in course of a regularly conducted business activity
 - C. Regular practice to make such record
 - D. If record is not the original, such record is a duplicate of the original
- United States v. Sturman*, 951 F.2d 1466, 1489-90 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)
2. Admissible unless source of information or preparation is untrustworthy.
 3. Must give notice to other party.
 4. Terms defined, 18 U.S.C. § 3505(c) -- "foreign record of regularly conducted activity," "foreign certification," and "business."
 5. Applies only to foreign records, no certification as to domestic records.

PROOF OF NEGATIVE

"BUSINESS RECORDS"

Rule 803(7), Fed R. Evid.

1. Rule 803(7) is limited to records that qualify as records of regularly conducted activity under Rule 803(6).

2. Must lay foundation that entry not appearing in records is the kind that would be recorded, *i.e.* same foundation you lay for the admission of a business record under Rule 803(6).
3. Foundation laid then absence of entry is evidence of the non-occurrence or non-existence of the matter, act, or event:

See United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) (manager testified that his supervisor made search)
4. *Note*: Rule applies to report, record, or data compilations -- same as Rule 803(6).
5. *Escape clause*: unless sources of information or other circumstances indicate a lack of trustworthiness.

***PROOF OF NEGATIVE
PUBLIC RECORD OR ENTRY
Rule 803(10), Fed. R. Evid.***

1. Rule 803(10) applies to absence of an entry in a public record, report, statement or data compilation; OR to the nonexistence of a matter of which a record would have been made.
2. Proof of negative -- two ways available:
 - A. *Certification* of absence of entry under Rule 902
 - OR
 - B. *Testimony* that "*diligent search*" did not disclose the record, entry, report, etc.
3. Neither procedure is given priority under Rule 803(10) -- can certify or produce witness, or do both.

***CERTIFICATION PROCEDURE
Rule 803(10), Fed. R. Evid.***

1. Examples:

United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991) (certificate that no tax return was filed by taxpayer)

United States v. Yakobov, 712 F.2d 20, 23-24 (2d Cir. 1983) (certificate that no firearm license was issued to defendant)
2. Certification procedure is *only available* in case of public records; *not* available as to private records

3. Certification procedure is handy and often sufficient unless:
 - A. Explanatory testimony is needed
 - B. Witness can add color

WITNESS PROCEDURE

Rule 803(10), Fed. R. Evid.

1. Witness route -- must testify that a diligent search was made:

United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978)

United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

United States v. Rich, 580 F.2d 929, 938 (9th Cir. 1978)

Cf. United States v. Martinez, 700 F.2d 1358, 1365 (11th Cir. 1983)
2. No testimony required as to the nature of the record keeping, *i.e.* not necessary to lay any business records foundation under Rule 803(10) as you must when proceeding under Rule 803(6) and Rule 803(7):

United States v. Regner, 677 F.2d 754, 757-58 (9th Cir. 1982) (dissent)

United States v. Farris, 517 F.2d 226, 229, n. 2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (case under former 28 U.S.C. § 1733(a), BUT same principles apply to Rule 803(10) -- Court pointed out what is now Rule 803(6) foundation is superfluous)
3. BUT must establish no entry in record "regularly made and preserved by a public office or agency." Rule 803(10), Fed. R. Evid.

CASE EXAMPLES

1. Criminal failure to file case -- certified statement that search of master files indicated no returns filed:

United States v. Cepeoa Penes, 577 F.2d 754, 760 (1st Cir. 1978) (testimony and certification that no return filed)

United States v. Liebert, 519 F.2d 542 (3d Cir.), *cert denied*, 423 U.S. 985 (1975)

United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

United States v. Johnson, 577 F.2d 1304, 1312 (5th Cir. 1978) (testimony by IRS employee that there was no record of filing a return)

United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991)

United States v. Farris, 517 F.2d 226, 227, (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)
(certification of failure to file)

2. Certificate of non-registration of firearms.

United States v. Cruz, 492 F.2d 217, 220 (2d Cir.), *cert. denied*, 417 U.S. 935 (1974)

3. Rejected -- testimony failed to show records were complete and a *casual or partial search* does not justify a conclusion of no records:

United States v. Robinson, 544 F.2d 110, 113-114 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978) (witness should testify that agency regularly made and preserved records of unemployment payments and that a diligent search of those records failed to disclose any record of a payment to alibi witness)

4. *Bank robbery case*: FBI agent testified to examination of police records, sheriff's records, etc., disclosed to Dale Anderson who allegedly borrowed defendant's car -- testimony proper as to business records; harmless error as to public records because no objection by defense, BUT agent should have testified record search was conducted in a *diligent manner*):

United States v. Rich, 580 F.2d 929, 937 (9th Cir. 1978)

IRS CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Rule 803(10) -- To Prove Failure to File

1. *United States v. Neff*, 615 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980)
(tax protestor failure-to-file case; great discussion of the law in this area)
2. Can obtain from Service Center an IRS Certificate of Assessments and Payments, Form 4340, that will "report" whether returns filed or not.

3. Government introduced certificate in *Neff* case -- BUT government also had custodial witness testify that search made of National Computer Center where all tax information is recorded "for every individual in the nation."
4. *Held*: Certificate admissible under Rule 803(10) -- no violation of confrontation clause
See also United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)
United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991);

NOTARIZED AFFIDAVIT ADMITTED

Rules 803(10), 902(8)

1. *United States v. M'Biye*, 655 F.2d 1240, 1241-42 (D.C. Cir. 1981) (Per Curiam) -- excellent example of what you can do beyond a simple "No".
2. Charged 18 U.S.C. § 1014 -- making false statement on bank loan application -- defendant said he worked for the United Nations.
3. Affidavit by personnel officer of United Nations Secretariat that defendant did not work for United Nations
4. *TAKE A LOOK AT AFFIDAVIT* -- *M'Biye*, 655 F.2d at 1242 -- it will make you think.
5. *Note*: affidavit sworn to before a notary therefore self-authenticating under Rule 902(8)

EXAMPLES -- PROOF OF

NEGATIVE IN CRIMINAL TAX CASES

Rules 803(7), 803(10)

1. No record of incorporation or filing of corporate report.
2. No record of property owned or of property taxes paid.
3. No probate record.
4. No record of savings bonds.
5. No record of birth, marriage, death, *see* Rule 803(12).
6. No record of earnings -- government worker (Rule 803(10)); private employee (Rule 803(7)).
7. No record of insurance policy.
8. No record of stock purchased or sold.
9. No record of fire, theft, or police complaint.
10. No record of earnings -- Social Security.

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11. No record of purchase, sale, or cancellation of an order.
12. No record of car being rented, or purchased, or repaired.
13. No record of bank account, deposit, check issued, or loan.
14. No record of staying at hotel, being on a plane, church pledge, membership in union and similar items.
15. No record of filing an income tax return, an S.E.C. registration statement, an oil and gas report

***PUBLIC RECORDS AND REPORTS
RECORDED DOCUMENTS***

APPLICABLE RULES

- | | |
|---|-----------------|
| 1. Admissibility of public records | Rule 803(8) |
| 2. Proof of negative - discussed previously | Rule 803(10) |
| 3. Admissibility of records of documents affecting property | Rule 803(14) |
| 4. Authenticity -- recorded, filed or from a public office | Rule 901(7) |
| 5. Self-authenticated copies | Rule 902(1)-(5) |
| 6. Authenticity -- statutory methods | Rule 901(10) |
| 7. Evidence of contents -- original not required | Rule 1005 |

***ADMISSIBILITY AND CERTIFICATION
OF PUBLIC -- OFFICIAL RECORDS***

1. The Federal Rules of Evidence and numerous statutes provide for the *admission of public records as an exception to the hearsay rule*.
2. Custody establishes authenticity.
3. Public records must still meet tests of admissibility, *e.g.*, relevancy, hearsay, privilege, etc.
4. Rules provide for certification of copies of public records by the appropriate officer.

5. *Point*: certification "establishes" authenticity without calling a witness; it does not confer *admissibility upon a public record*.

PUBLIC -- RECORDED RECORDS -- MEANING

1. Governmental documents -- federal and state.
2. Activities of public office -- documents containing factual matter to which public official could testify if called as a witness:
 - A. Rule 803(8), Fed. R. Evid.
 - B. Cases:
 - United States v. Ream*, 491 F.2d 1243, 1246-47 (5th Cir. 1974)
 - Yaich v. United States*, 283 F.2d 613, 618 (9th Cir. 1960)
 - Johnson v. United States*, 285 F.2d 700, 701-02 (9th Cir. 1961)
 - Williamson v. Union Oil Co.*, 125 F. Supp 570, 572 (D. Colo, 1954)
3. Records of vital statistics, IF public record made under requirements of law -- Rule 803(9), Fed. R. Evid.:
 - A. Can establish birth, death, marriage, etc.
 - B. Easy way to establish -- certify document
4. *Recorded documents* -- documents customarily recorded or authorized by law to be kept in a public office or agency of the United States and any state, territory or possession:
 - A. Rule 803(14), Fed. R. Evid. -- documents affecting an interest in property
 - B. Rule 1005, Fed. R. Evid. -- contents of public records
5. *Official records*:
 - A. Often used interchangeably with "public document"
 - B. Entitled to presumptions of regularity and validity:
 - United States v. Rogers*, 454 F.2d 601, 604 (7th Cir. 1971)
 - C. An official document is one executed by a government employee in the course of performing his duties:
 - United States v. Aluminum Co. of America* 1 F.R.D. 71 (1939)
6. *Official publications* -- books, pamphlets, or other publications *purporting* to be issued by public authority -- Rule 902(5), Fed. R. Evid.

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7. *Foreign records* can be public records and come under public records exception rules:

A. See *United States v. Regner*, 677 F.2d 754, 762 (9th Cir. 1982) (dissent), "courts regularly admit foreign documents pursuant to these exceptions [Rules 803(6), 803(7), 803(8) and 803(10)]", and cases cited

B. United Nations Secretariat -- United Nations is a "public office or agency" within the meaning of Rule 803(10)

United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981) (Per Curiam)

EXAMPLES

PUBLIC/OFFICIAL RECORDS

- Recorded deeds and mortgages -- ownership and liability
- Books, pamphlets, etc., published by government printing office
- Probate records -- ownership, financial position
- Bankruptcy records -- financial position
- Income tax returns -- state and federal
- Water and light payments -- IF maintained by public entity
- Motor vehicle titles and personal property -- ownership (liens)
- Records of convictions
- Birth, marriage, and death records
- Articles of incorporation filed in recorder's office

HEARSAY EXCEPTION --

ADMISSIBLE -- PUBLIC RECORDS

IN ANY FORM REFLECTING

Rule 803(8), Fed. R. Evid.

1. Records, reports, statements, or data compilations, in any form, of public offices or agencies, are *not excluded by the hearsay rule* which set forth:
 - A. the activities of the office or agency, or
 - B. a matter observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding*, however, *in criminal cases* matters observed by police officers and other law enforcement personnel, or
 - C. in civil actions and proceedings and *against the government in criminal cases*, factual findings resulting from an investigation made pursuant to authority granted by law,

unless the sources of information or other circumstances indicate lack of trustworthiness

GENERAL COMMENT

Rule 803(8), Fed. R. Evid.

1. *Exception to hearsay rule* -- admits records of public offices and agencies; equivalent for private business records is Rule 803(6).
2. Not necessary to lay business records foundation -- merely establish document is a public record, *e.g.*, from public office or agency and reflects the activities of the office or agency:

United States v. Farris, 517 F.2d 226, 229, n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

United States v. Regner, 677 F.2d 754, 761 (9th Cir. 1982) (dissent)

3. But must still show document is authentic, relevant, etc., and otherwise admissible:

United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

ACTIVITIES OF OFFICE OR AGENCY

Rule 803(8)(A), Fed. R. Evid.

1. "Admissibility" of records of activities of office or agency.
2. *Examples*:

- A. Treasury records of receipts and disbursements:

Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919)

- B. Selective Service records:

United States v. Ream, 491 F.2d 1243, 1246-47 (5th Cir. 1974)

United States v. Hudson, 479 F.2d 251, 253 (9th Cir. 1972)

- C. *Checks* issued by Ohio Bureau of Workmen's Compensation in tax evasion case -- - admissible under either Rule 803(6) or 803(8):

United States v. Hans, 684 F.2d 343, 346 (6th Cir. 1982)

- D. *Judgement and commitment order* relating to criminal conviction and *receipt for a prisoner* from the marshal:

United States v. Wilson, 666 F.2d 1241, 1248 n.2 (9th Cir. 1982)

3. Records of public schools and hospitals also included -- fall under Rule 803(6):
 - A. Conference Report No. 93-1597, 93d Cong., 2d Sess., United States Code Congressional and Administrative News (1974), p. 7104
4. *Criminal failure to file case*: Service Center records, technically not necessary to lay a business records foundation -- they are government public records and admissible under Rules 803(8) and 803(10):

United States v. Farris, 517 F.2d 226, 229 n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

***PUBLIC RECORDS AND REPORTS
OF FOREIGN GOVERNMENTS***

Rule 803(8)(a), Fed. R. Evid.

1. Rule 803(8)(a) is not limited to domestic records -- applies to foreign records also.
2. *See* for example:

United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (records of Royal Ulster Constabulary)

United States v. Rodriguez Serrate, 534 F.2d 7, 10 (1st Cir. 1976) (Dominican identification card, birth certificate, military records, death certificate, passport records and demographic registry)

MATTERS OBSERVED -- DUTY TO REPORT

Rule 803(8)(b), Fed. R. Evid.

1. Does *not* include random observations of public official; relates to matters observed pursuant to general duties of official.
2. *Examples* of matters included:

- A. Weather Bureau records of rainfall

Minnehaha County v. Kelley, 150 F.2d 356, 360 (8th Cir. 1945)

Flythe v. United States, 405 F.2d 1324, 1325-26 (C.A. D.C., 1968)

- B. Letter from induction officer to District Attorney pursuant to regulations

United States v. Van Hook, 284 F.2d 489, 491 (7th Cir. 1960), *remanded for resentencing*, 365 U.S. 609 (1961)

BUT NOT ADMISSIBLE IN CRIMINAL CASES:

Rule 803(8)(b), Fed. R. Evid.

1. "Matters observed by police officers and other law enforcement personnel."
2. FBI reports, special agent's report in tax cases, and the like, NOT admissible -- usually at the instance of the government.
3. *Adversarial nature of criminal cases* -- police observations at scene of crime not as reliable as observations by public officials in other cases because of adversarial nature of confrontation between the police and defendant in criminal case:

S.Rep. No. 93-1277 on HR 5463, United States Code Congressional and Administrative News (1974), p. 7064
4. *Point*: reports are deemed partisan, lack inherent trustworthiness.
5. Report of government chemist -- see *United States v. Oates*, 560 F.2d 45, 66 (2d Cir. 1977) (case contains an interesting discussion of Rule 803(8) and congressional intent, BUT reaches a strained result; report of government chemist excluded) -- compare to cases ahead

RECORDS OF

NON-ADVERSARIAL MATTERS -- NOT EXCLUDED

Rule 803(8)(b), Fed. R. Evid.

1. Marshal's return of service admissible under Rule 803(8)(b):

United States v. Union National de Trabajadores, 576 F.2d 388, 391 (1st Cir. 1978)
2. Irish police records reflecting serial numbers and receipt of weapons found in Northern Ireland not excluded by Rule 803(8)(b) -- these were not observations by police of commission of crimes

United States v. Grady, 544 F.2d 598, 604 (2nd Cir. 1976)
3. Serial number report of Bureau of Alcohol, Tobacco and Firearms to establish that firearm travelled in interstate commerce was admissible -- kept in a ministerial fashion, pursuant to legal authority and not in anticipation of trial

United States v. Johnson, 722 F.2d 407, 410 (8th Cir. 1983)
4. "Congress did not intend to exclude records of routine, non-adversarial matters" -- customs records of license plates of cars crossing border made by law enforcement personnel, admissible

United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979)

FACTUAL FINDINGS OF INVESTIGATION

MADE PURSUANT TO LAW

Rule 803 (8)(c), Fed. R. Evid.

1. ***ADMISSIBLE: IN CIVIL CASES AND ONLY AGAINST THE GOVERNMENT IN CRIMINAL CASES.***
2. Refers to so-called investigative or evaluative reports -- a controversial section.
3. Rule only applies to investigations made *pursuant to authority granted by law*:
 - A. Private investigations are not included
 - B. Official state investigations could be admissible
4. ***ADMISSIBILITY LIMITED TO FACTUAL FINDINGS*** -- Rule 803(8)(c):
 - A. *House*: "The Committee intends that the phrase, 'factual findings,' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule."

House Rep. No. 93-650 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7088
 - B. *Senate*: The Committee takes strong exception to the House limiting the application of the rule. Types of reports recognized by Congress (*e.g.*, 7 USC 78, Finding of Sec. of Agriculture prima facie evidence of true grade of grain) indicates type of reports intended to be admissible -- can always exclude if found not trustworthy

Senate Rep. No. 93-1277 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7064
 - C. *Conference Report* -- Silent on this point:

Conference Rep. No. 93-1597 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7098
5. IRS computer printout with coded notation that defendant told unidentified IRS official he was not required to file a corporate return -- error to admit against the defendant. *See United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978):
 - A. Rule 1005, Fed. R. Evid. admits copies, BUT only if the contents of the original record are otherwise admissible
 - B. *Hearsay* -- not admissible under Rule 803(8) -- matter observed by law enforcement personnel
 - C. *Note*: better reason would seem to be lack of identity of person who took report, *i.e.*, how can it be said it was the defendant who spoke, etc.

6. Admissible on behalf of defense -- police report and transcript of police broadcast"

United States v. Smith, 521 F.2d 957, 963-64 (D.C. Cir. 1975)

***FACTUAL FINDINGS --
UNLESS CIRCUMSTANCES
INDICATE LACK OF
TRUSTWORTHINESS
Rule 803(8)(c)***

1. IF *sources* of information or other circumstances indicate lack of trustworthiness, then factual finding is *NOT* admissible against government.
2. This is the escape clause -- always consider in criminal case whether a factual finding in a report is "trustworthy."
3. Trustworthiness is tested by factors such as:
 - A. Timeliness of investigation
 - B. Special skill or experience of official
 - C. Whether a hearing was held and level at which conducted
 - D. Possible problem of motive or bias
Adv. Comm. Note to Rule 803(8), 51 F.R.D. 315, 431
 - E. Finding not supported by sufficient data
4. Judge "must" exclude report unless she can find sources of information and other circumstances indicate report is trustworthy.
5. S.E.C. release concerning stock controlled by one of defendants excluded as hearsay -- "not a determination of facts obtained after administrative proceedings":

United States v. Corr, 543 F.2d 1042, 1050-51 (2d Cir. 1976)

***RECORDED DOCUMENTS
AFFECTING AN INTEREST
IN PROPERTY
Rule 803(14), Fed. R. Evid.***

1. Authorized recorded document affecting an interest in property is "admissible" as:
 - A. Proof of contents of original document
 - B. Proof of execution and delivery by each person executing the document
2. Covers records such as deeds, mortgages, leases, land contracts.
3. Eliminates objections such as: signature not proved; delivery of instrument not established, etc.

4. *Confined to recorded documents* from public office authorized for recording.
5. Mortgage recorded in land office falls within Rule 803(14), Fed. R. Evid.
United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978)
6. *Proof of marriage*: evidence included recitals in two warranty deeds executed as husband and wife, *Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1228 (D. Wyo. 1985):

Recitals contained in ancient documents, and in documents and records affecting interests in property are admissible as proof of the matters asserted, and constitute strong evidence concerning such matters. *See* Fed. R. Evid. 803(14), (15), and (16)
7. *Tax evasion case*: Government expert's testimony as to what various records in county clerk's office said held improper -- documents were not introduced:

United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978) (can't merely have a witness testify (hearsay) as to contents of document -- Rule 803(14) applies to recorded documents)
8. DISTINGUISH: Witness can testify that copy is a true copy of an official record or recorded document -- But document "testifies" as to contents, *not* witness -- Rule 1005, Fed. R. Evid.

STATEMENTS IN DOCUMENTS

AFFECTING AN INTEREST IN PROPERTY

Rule 803(15), Fed. R. Evid.

1. Statements in documents affecting an interest in property if relevant to purpose of documents and subsequent dealings with property are not inconsistent with documents:

Compton v. Davis Oil Co., 607 F. Supp. 1221, 1229 (D. Wyo. 1985) (acted as if title in heirs for thirty-seven years)
2. Rule applies to document itself.
3. Not necessary that document be recorded.
4. Do not have to produce witnesses to transaction -- merely authenticate document.

RESIDUAL HEARSAY EXCEPTION

Rule 803(24), Fed. R. Evid.

1. Creates a general exception to the inadmissibility of hearsay when there are adequate "circumstantial guarantees of trustworthiness."
2. Requires that the proponent give notice of its intention to specifically rely on 803(24) as grounds for admissibility.

3. *Examples:*

Bank Records -- provides circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business

4. *United States v. Pelullo*, 964 F.2d 193, 202 (3d Cir. 1992)

AUTHENTICITY

***REQUIREMENT OF AUTHENTICATION
OR IDENTIFICATION***

Rule 901(a), Fed. R. Evid.

1. Must establish that evidence is genuine and it is what you claim it is, *i.e.*, that it is authentic.
2. Authentication is "(a) . . . satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims":

A. Rule 901(a), Fed. R. Evid.

B. Rule 104(b), Fed. R. Evid.

3. Sufficiency of the authentication of a document rests in the sound discretion of the trial court and will not be revised absent an abuse of discretion

United States v. Spetz, 721 F.2d 1457, 1476 (9th Cir. 1983)

4. Judge makes preliminary determination as to whether jury could find evidence authentic.
5. IF "yes," then evidence goes to jury and jury ultimately decides authenticity -- not the court:

United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

METHODS OF AUTHENTICATING

Rule 901(b), Fed. R. Evid.

1. Rule 901(b) sets forth ten (10) ways to authenticate, including:

Rule 901(b)(1) -- Testimony of witness with knowledge

Rule 901(b)(2) -- Nonexpert opinion on handwriting -- layperson can give opinion on handwriting if proper foundation laid

Rule 901(b)(4) -- Distinctive characteristics and the like

Rule 901(b)(7) -- Public records or reports

Rule 901(b)(10) -- Methods provided by statute or rule

PRIMA FACIE SHOWING

Rule 901(b), Fed. R. Evid.

1. Not limited to ten methods listed in Rule 901.
2. Point -- any admissible evidence that will prove a document, a voice, a writing, etc. is what you claim it is -- prima facie showing of authenticity.
3. *Repeat*: once prima facie showing of a document's authenticity is made then it goes to jury, not the court, for a factual determination of whether the document is authentic:

United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976)

United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

CHAIN OF CUSTODY

1. Documentary evidence -- general rule, not necessary to show chain of custody.
2. *Example*: makes no difference whether contract held or transferred to A, B, or C -- question is whether signatures are genuine or not.
3. *Example-- exceptions*: Place from where search warrant material taken, or whether records obtained from defendant or his bookkeeper, or where counterfeit bills obtained -- chain of custody or location of evidence can be helpful in establishing authenticity.
4. "[P]roof of private custody together with other circumstances is frequently strong circumstantial evidence of authenticity."

United States v. Bruner, 657 F.2d 1278, 1284 (D.C. Cir. 1981) (testimony of D.E.A. agent as to prescriptions obtained from office of doctor via subpoena plus other testimony as to nature of records)

5. *Tax case*: records often obtained from office of defendant.

AUTHENTICATION:

DISTINCTIVE CHARACTERISTICS AND THE LIKE

Rule 901(b)(4)

1. This section says you can use circumstances to show an item is genuine.
2. The it-walks-like-a-duck, quacks-like-a-duck, looks-like-a-duck, then-it is-a-duck approach.
3. Two notebooks detailing heroin transactions -- contents and circumstances used to support inference that apartment was scene of drug sales:
 - A. Not hearsay -- not offered for truth of contents but only to show apartment was scene of drug operation

United States v. Wilson, 532 F.2d 641, 646 (8th Cir. 1976)

- B. *Contents* -- only person familiar with deals could have written entries
 - C. Notebooks found in apartment frequented by two alleged conspirators
 - D. Unusual hole in door of apartment described by informant
 - E. Known co-conspirator in apartment during drug raid
 - F. Notebooks in code and informant testified defendant's drug transactions recorded in code in notebooks
 - G. Writer obviously familiar with the procedures used in drug operation
4. Income tax returns used as exemplars of handwriting and as basis for expert testimony on handwriting:

United States v. Mangan, 575 F.2d 32, 37, 41-42 (2d. Cir. 1978)

5. Ledger seized in defendant's residence and writer of entries unknown held authenticated on basis of contents, use of gambling terms, found in defendant's home, had fingerprints of two codefendants on it and names in ledger corresponded to the participants in the enterprise:

United States v. Helm, 769 F.2d 1306, 1312 (8th Cir. 1985)

6. Writing on letterhead paper sufficient to authenticate under Rule 901(4) absent suspicious circumstances or counterproof:

California Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1355 n.23 (C.D. Cal. 1983)

7. *Point*: Look to appearance, contents, and surrounding circumstances.
8. *Mail fraud case*: no chain of custody as to letters in exclusive possession of government for five years does not raise issues as to authenticity; original and copies held authentic on basis of appearance, contents and circumstances:

United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980)

AUTHENTICATION

PUBLIC RECORDS OR REPORTS

Rule 901(b)(7). Fed. R. Evid.

1. Evidence that a writing authorized by law to be recorded is in fact recorded; or that a purported public record is from a public office.
2. *One procedure*: call witness, e.g. recorder of deeds testifies as to nature of his office, records authorized to be filed, and that he is producing a true copy of deed, mortgage, etc.
3. *NOTE*: Usual procedure is to go via certification rather than witness -- *see ahead*.

4. BUT witness procedure is available and may be best where speed required and no time to certify; or witness can add color.

AUTHENTICITY VIA STATUTE

***AUTHENTICATION MAY BE
BY STATUTORY METHODS***

Rule 901(b)(10), Fed. R. Evid.

1. Any method of self-authentication provided by statute or other rules prescribed by Supreme Court pursuant to statutory authority.
2. *Example:* procedure for authenticating under Rule 44(a), Fed. R. Civ. P., made applicable to criminal cases by Rule 27, F. R. Crim. P., remains in effect.
3. Numerous statutes provide for authenticating procedures.

STATUTORY AUTHENTICATION

Rule 901(b)(10)

1. Type and procedure is set forth in statutes:

26 U.S.C. § 6103(p):	Internal Revenue Service documents
28 U.S.C. § 753(b):	Proceedings by official court reporter -- transcript certified by official reporter deemed <i>prima facie</i> correct
28 U.S.C. § 1733:	Government records
28 U.S.C. § 1734:	Court records -- lost or destroyed
28 U.S.C. § 1735:	Court records lost or destroyed where United States is a party
28 U.S.C. § 1738:	State statutes and judicial proceedings, <i>i.e.</i> , records and judicial proceedings of any court of any state
28 U.S.C. § 1739:	State -- non-judicial records or books kept in any public office of a state, territory or possession
42 U.S.C. § 3505:	Social Security record
44 U.S.C. § 3104:	Certification of transferred documents
47 U.S.C. § 412:	Records and reports of F.C.C.
2. Statutes remain in effect and public records properly certified are self-authenticating:

Rule 902(4), Fed. R. Evid.

3. Number of departments and agencies have specific statutes for use of records and documents in litigation.
4. Each department and agency will usually have forms and a certification procedure.
5. *Example*: Certified Social Security record:
42 U.S.C § 3505 -- authenticated by seal, copies admissible
6. For a list of over fifty statutes authorizing judicial notice of the seals of various United States Departments and agencies, *see Weinstein's Evidence*, ¶ 901(b)(10)[01] n.6
7. *Example* -- Tax Division, Department of Justice: Administrative officer of division will furnish certified copies of documents in Tax Division files:
28 U.S.C. § 502 -- seal of Department of Justice
Rule 902(1) -- seal purporting to be seal of United States, no extrinsic evidence required
8. *Allow plenty of time -- stress certification needed for litigation purposes.*

INCOME TAX RETURNS -- CERTIFICATION

1. Reproductions of returns and return information properly authenticated are admissible same as original -- 26 U.S.C. § 6103(p)(2)(C).
2. Authentication by certification -- District Director and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required:
A. 26 U.S.C. § 7514 -- seal of office
B. Treas. Reg. § 301.7514(c) (26 C.F.R.)
3. *See* prior discussion re introduction of tax returns at trial and statutory presumption re signature on return.

SELF-AUTHENTICATION

Rule 902, Fed. R. Evid.

1. Document is accepted as prima facie genuine -- witness is not needed.
2. No further evidence of authenticity is needed.
3. Document proves itself.
4. But still up to jury to decide if document is genuine:

***United States v. Jardina*, 747 F.2d 945, 951 (5th Cir. 1984)**

**TEN TYPES OF DOCUMENTS
MADE SELF-AUTHENTICATING
Rule 902, Fed. R. Evid.**

Rule 902(1)	Domestic public documents under seal
Rule 902(2)	Domestic public documents not under seal
Rule 902(3)	Foreign public documents
Rule 902(4)	Certified copies of public records
Rule 902(5)	Official publication
Rule 902(6)	Newspapers and periodicals
Rule 902(7)	Trade inscriptions and the like
Rule 902(8)	Acknowledged documents
Rule 902(9)	Commercial paper and related documents
Rule 902(10)	Presumptions under Acts of Congress

**AUTHENTICATION OF PUBLIC RECORDS
BY CERTIFICATION**

1. CANNOT BE USED *FOR PRIVATE DOCUMENTS* -- only available for governmental records, *i.e.*, public records, official records, and recorded instruments.
2. Provides method for certifying as to authenticity.
3. *Self-authenticating*: document treated as prima facie genuine.
4. *certified*: self-authenticating, not necessary to produce a witness -- the certificate is the witness.
5. Eliminates need for a witness where document speaks for itself, *e.g.*, deed, mortgage, judgment.
6. Moves trial faster.
7. Can move admission when logically, chronologically, or tactically appropriate.
8. *CERTIFICATION -- VOLUNTARY PROCEDURE -- CAN ALWAYS CALL A WITNESS*

DISTINGUISH:

AUTHENTICITY vs. ADMISSIBILITY

1. Authentication of a document does not mean it is admissible -- may be barred by hearsay rule, privileges, prejudice outweighs probative value, irrelevant, etc.
2. Rules only provide a method of authenticating a document, a telephone conversation, etc.
See United States v. Verville, 355 F.2d 527, 530 n.5 (7th Cir. 1965) (Rule 27 Fed. R. Crim. P., BUT principle applies to authentication versus admissibility)
3. Must still lay a foundation for admissibility.
4. Certification is merely evidence that document is genuine.

SELF-AUTHENTICATING

CERTIFIED PUBLIC DOCUMENTS AND RECORDS

Rules 902(1) thru 902(4), Fed. R. Evid.

1. No further evidence of authenticity required.
2. *Domestic public documents bearing a public seal and signature*
Rule 902(1):
 - A. Includes seals of United States, states and public offices having a seal, *i.e.*, political subdivisions, departments, officers and agencies
 - B. Numerous sections of United States Code provide for judicial notice of official seals
 - C. Signature with seal of office is enough
United States v. Moore, 555 F.2d 658, 661 (8th Cir. 1977)
United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied*, 429 U.S. 943 (1976) (motor vehicle registration record)
3. *Domestic public documents not under seal* -- Rule 902(2):
 - A. Applies to documents signed in person's official capacity where public officer or employee has no seal of office
 - B. Public officer with seal and duties in district must then certify under seal that signer has official capacity (is custodian) and that the signature is genuine
Hunt v. Liberty Lobby, 720 F.2d 631, 651 (11th Cir. 1983) (CIA affidavits by custodian of records and certification of general counsel with CIA seal that affiants occupied the position stated in the affidavits)
4. *Foreign public documents* -- Rule 902(3):

- A. Procedure set forth for certifying foreign documents
- B. Procedure is time-consuming and cumbersome
- C. Procedure modeled on Rule 44(a)(2) of Federal Rules of Civil Procedure
- D. *Conviction reversed*: Record of convictions in Israel not properly certified -- aura of authenticity is not enough -- testimony of INS Agent did not establish that certificate was signed by one acting in official capacity who was authorized to sign

United States v. Perlmutter, 693 F.2d 1290, 1292 (9th Cir. 1982)

Compare, ***United States v. Regner***, 677 F.2d 754, 757-59 (9th Cir. 1982)

5. *Certified copies of public records* -- Rule 902(4):

- A. Provides for authentication of copies of public records when properly certified
- B. Applies to documents authorized to be recorded and filed and actually recorded or filed in public offices, *e.g.*, deeds, mortgages, etc.
- C. Certification may be via Rule 902(1), (2) or (3); OR BY ANY ACT OF CONGRESS or rule adopted by the Supreme Court
- D. *If custodian has a seal of office*, then her certification under seal that she has custody and the copy is correct is enough -- BUT
- E. *If custodian has no seal*, then in addition to certification of custodian, a public officer must certify under her seal that the signor is the custodian and the signature of the custodian is genuine
- F. This is basically the procedure of Rule 44(a) of the Federal Rules of Civil Procedure made applicable to criminal cases by Rule 27, Fed. R. Crim. P.

CASE EXAMPLES

Rule 902, Fed. R. Evid.

- 1. Registration record of stolen vehicle admitted to show it was not registered in the name of the defendant:

United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied*, 429 U.S. 943 (1976) (Rule 902(1) and 28 U.S.C. § 1739)
- 2. Federal Deposit Insurance Corporation certificate admitted in bank robbery case -- F.D.I.C. is an agency of the United States and testimony that F.D.I.C. certificate bearing purported seal of F.D.I.C. was hanging on the wall of the bank was enough:

United States v. Wingard, 522 F.2d 796, 797 (4th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976)

3. Certified transcript of testimony of one of defendants at a prior hearing -- certified court transcript read at trial:

Anderson v. United States, 417 U.S. 211, 220 n.11 (1974)

4. IRS Certificate of Assessments and Payments -- no tax returns filed:

United States v. Neff, 615 F.2d 1235, 1241 (9th Cir. 1980), *cert. denied*, 447 U.S. 925 (1980) (document showing no filing was made and preserved by the IRS, "a public office or agency," and was evidence in the form of a certification in accordance with Rule 902(4) and (1))

SELF-AUTHENTICATING

ACKNOWLEDGED -- NOTARIZED DOCUMENTS

Rule 902(8), Fed. R. Evid.

1. In almost every state, acknowledged title documents are receivable in evidence *without further proof*:

See 5 Wigmore 1676

2. Self-authenticating -- any document with a certificate of acknowledgement executed by a notary or other officer as provided by law.
3. *Note*: not limited to title documents.
4. *A very important rule*: means you may not need a witness if document speaks for itself.

EXAMPLE

NOTARIZED DOCUMENT ADMITTED

Rules 803(10) and 902(8), Fed. R. Evid.

1. Criminal charge of making false statements to a Federally insured bank, *i.e.*, defendant said he worked for United Nations.
2. Affidavit of U.N. official stating defendant did not work for United Nations was admissible as public record -- proof of a negative under Rule 803(10).
3. BUT problem was how could affidavit be authenticated -- Rules 902(1) and 901(2) are limited to *domestic* entities.
4. *Solution By Court*: affidavit was notarized in New York by a notary public and was self-authenticating:

See United States v. M'Biye, 655 F.2d 1240, 1241-42 (C.A. D.C., 1981)

***SELF-AUTHENTICATING
COMMERCIAL PAPER AND RELATED DOCUMENTS***

Rule 902(9), Fed. R. Evid.

1. Self-authentication, Rule 902(9): Commercial paper and related documents. -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
2. A very important rule.
3. Makes promissory notes, checks, bills of exchange and other commercial documents self-authenticating.
4. *Note* rule also applies to signatures on commercial documents.
5. No witness needed to establish authenticity.

***GENERAL COMMERCIAL LAW
UNIFORM COMMERCIAL CODE***

Rule 902(9), Fed. R. Evid.

1. "General commercial law" -- Committee intends that the Uniform Commercial Code (UCC) will be followed generally:
 - A. House Report No. 93-650, Rule 902(a), 28 U.S.C.A. Fed. R. Evid., Legislative History, p. 652
 - B. Advisory Committee Note to Rule 902(9)
2. Uniform Commercial Code has been adopted by all states except Louisiana, which has adopted only Articles 1, 3, 4 and 5:

See Weinstein's Evidence ¶ 902(9)[01] n.1

***PERTINENT PROVISIONS OF
UNIFORM COMMERCIAL CODE (UCC)***

Rule 902(9), Fed. R. Evid.

1. *Section 1-202. Prima Facie Evidence by Third Documents*

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

2. *Section 3-307. Burden of Establishing Signatures Defenses and Due Course.*

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue,

- (a) the burden of establishing it is on the party claiming under the signature; but
- (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

3. *Section 3-510. Evidence of Dishonor and Notice of Dishonor*

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

- (a) a document regular in form as provided in the preceding section which purports to be a protest;
- (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;
- (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

4. *Section 8-105. Securities Negotiable; Presumptions*

- (2) In any action on a security
 - (a) Unless specifically denied in the pleadings, each signature on the security or in a necessary endorsement is admitted;
 - (b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under signature but the signature is presumed to be genuine or authorized;

CASE EXAMPLE -- Rule 902(9)

PROMISSORY NOTE

Rule 902(9), Fed. R. Evid.

1. *United States v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979):

- A. *Tax evasion case* -- net worth method proof and defendant attacked opening net worth on grounds it was error to exclude promissory note to show defendant made loans and thus had non-income funds in prosecution year
- B. *Held*: Conviction reversed, notes were self-authenticating, and relevant and signatures on notes are presumed genuine

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2. Relevant because the government's opening net worth contained no indebtedness from Vernon Carriger to the defendant and "the notes at least had a tendency to make more probable the fact so claimed by the defendant that the defendant's opening net worth was inaccurate." Rule 402, Fed. R. Evid.
3. Authentic because "the notes were sufficiently identified as promissory notes by their production and no further authentication was required by reason of an applicable provision for self-authentication in Rule 902(9), Fed. R. Evid.":

United States v. Carriger, 592 F.2d at 316

4. "No testimony required to establish genuineness of the signatures on the notes. . . UCC § 3-307 creates a presumption that commercial paper offered in evidence is authentic"

United States v. Carriger, 592 F.2d at 316

CASE EXAMPLE -- Rule 902(9)

CHECKS SELF-AUTHENTICATING

1. *United States v. Little*, 567 F.2d 346, 349 n.1 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978):
 - A. Mail fraud conviction - check kiting scheme
 - B. Checks drawn on corporate accounts admitted into evidence
 - C. "The court also did not err in admitting the corporate checks into evidence. The checks were relevant, admissible under Federal Rule of Evidence 902(9) as commercial paper or as an exception to the hearsay rule under Rule 803, and did not unfairly prejudice the defendant (567 F.2d at 349 n.1)
2. *Matter of Richter & Phillips Jewelers & Dist.*, 31 B.R. 512, 514 n.1 (Bkrcty., S.D. Ohio 1983):
 - A. Federal Rules of Evidence apply to bankruptcy proceedings
 - B. Check is self-authenticating under Rule 902(9) -- extrinsic evidence not necessary

CASE EXAMPLE -- Rule 902(9)

COLLEGE TRANSCRIPTS SELF-AUTHENTICATING

1. *United States v. Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979):
 - A. Drug case and court extended itself
 - B. College transcript not admissible as a business record since no foundation witness testified

- C. Court admitted transcript under Rule 803(24)
- D. Found transcript to be self-authenticating under Rules 901 and 902:
 - i. Took judicial notice of existence of college
 - ii. Found it was normal for college to make such a record in the course of its operations
 - iii. Transcript had indicia of being an authentic copy since it bore seal of registrar and signature
 - iv. Personal information in transcript was corroborated by a witness

ALSO SELF-AUTHENTICATING
Rules 902(5) and 902(6), Fed. R. Evid.

- 1. "*Official publications. -- Books, pamphlets, or other publications purporting to be issued by public authority.*"
Rule 902(5)
 - A. *Example:* Book issued by Government Printing office, State Agency, etc.
 - B. *Reminder:* Does not provide for admissibility; merely for authenticity
 - C. Bureau of Labor statistics would come under this rule
- 2. *Newspapers and periodicals:* printed materials *purporting* to be newspapers or periodicals --
Rule 902(6):
 - A. Magazine article was self-authenticating, *Application of Consumers Union of U.S., Inc.*, 495 F. Supp. 582, 587 n.2 (S.D.N.Y. 1980)
 - B. *Example:* Copy of *Washington Post* is self-authenticating

WITNESS NEEDED -- EXAMPLE

IRS CERTIFICATE OF ASSESSMENT AND PAYMENTS -- FORM 4340
COMPUTER TRANSCRIPT -- FORM 4303

- 1. IRS maintains a bookkeeping record of each taxpayer.
- 2. Transcript or Certificate of Assessments and Payments reflects information as to a given taxpayer such as date returns filed, absence of filing, payment made, penalties paid, estimated tax payments, and the like.
- 3. Transcript can be useful at trial -- *examples:*
 - A. Net worth case -- reflects taxes paid, a non-deductible item
 - B. Tax history -- delinquent returns, penalties paid, audit results, date return filed
 - C. Returns destroyed -- can still establish tax history

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4. Certificate of Assessment used to prove contents of return when fire destroyed file copy and only copy available was penciled retained copy of taxpayer
 - A. *Moore v. United States*, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
5. Transcript can be certified under statutory procedure, Rule 44 procedure, or Rule 902(1), (4), Fed. R. Evid.; also admissible under Rule 803(8) and Rule 1005, Fed. R. Evid.
6. Admissibility of certified transcript:
 - A. Fed. R. Evid. 803(8), 1005
 - B. *Vloutis v. United States* 219 F.2d 782, 789 (5th Cir. 1955)
 - C. *Holland v. United States*, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)
 - D. *Moore v. United States*, 254 F.2d 213, 216 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
7. Witness needed:
 - A. Documents does not speak for itself -- explanation needed
 - B. BUT -- have Certificate of Assessments and Payments certified under Rule 902(1) and have witness explain terms, codes, etc.
8. Contact Service Center well in advance of trial -- takes time to obtain certified documents.
9. Obtain proper witness and arrange for interview.

MISCELLANEOUS RULES

RULE OF COMPLETENESS

Rule 106, Fed. R. Evid.

1. "When a writing or recorded statement or part thereof is introduced by a party, an *ADVERSE PARTY* may require the introduction at that time of any *other part* or any other writing or recorded statement *which ought in fairness to be considered contemporaneously with it.*" (emphasis supplied)
2. *Scope of Rule 106:*
 - A. *LIMITED TO WRITING OR RECORDED STATEMENTS*
 - B. Testimony as to conversations is not covered by Rule 106
 - C. *Practical matter*: case law applies the rule of completeness to conversations -- *see below*
 - D. *Rule provides for:*
 - i. Admission of any other part of offered document, or

- ii. any other document,
- iii. which ought in fairness to be considered contemporaneously with document to be admitted

APPLICABLE PRINCIPLES -- PRE-RULES

1. *Part of a document, a correspondence, or a conversation* admitted -- then opponent may put in balance to rebut adverse inferences of incomplete evidence:
 - United States v. Corrigan*, 168 F.2d 641, 645 (2d Cir. 1948)
 - United States v. Paquet*, 484 F.2d 208, 212 (5th Cir. 1973)
2. BUT, *only relevant parts* of document or conversation may be admitted on rule of completeness theory:
 - United States v. Dennis*, 183 F.2d 201, 229-30 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951)
 - United States v. Littwin*, 338 F.2d 141, 145 (6th Cir. 1964)
 - United States v. Smith*, 328 F.2d 848, 850 (6th Cir. 1964)
3. *NO RULE THAT ONCE PART OF A DOCUMENT OR CONVERSATION IS ADMITTED, THE ENTIRE DOCUMENT MUST BE RECEIVED:*
 - Dennis*, 183 F.2d 201, 229-30 (2d Cir. 1950)
 - Camps v. New York City Transit Authority*, 261 F.2d 320, 322 (2d Cir. 1958)
 - Littwin*, 338 F.2d 141, 145 (6th Cir. 1964)
 - United States v. McCorkle*, 511 F.2d 482, 486 (7th Cir. 1975)
4. Rule 106 deviates from the common law only in respect to time of admission:
 - United States v. Walker*, 652 F.2d 708, 710 n.2 (7th Cir. 1981)
5. BUT note that case law applies to conversations, doctrine of verbal completeness -- Rule 106 applies only to writing or recorded statement.

ADMISSIBLE AT THAT TIME

Rule 106, Fed. R. Evid.

1. *Portion of document admitted* then adverse party can insist on admission *AT THAT TIME* of any other part of document or any other document that "ought in fairness" be considered at the same time.

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2. Party seeking admission of evidence under Rule 106 is "entitled to compel the admission at the time the opposing party offers the partial evidence or waiting until a later stage of trial":

United States v. Walker, 652 F.2d 708, 710 n.2 (7th Cir. 1981) (conviction reversed, defendant entitled to have contemporaneous admission when government introduced portion of transcript)

3. Rule 106 requires "that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact":

United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

United States v. Rubin, 609 F.2d 51, 63-64 (2d Cir. 1979)

4. Rule is to prevent admission in evidence of truncated statements giving an out of context picture to the jury -- judge makes a "determination of fairness":

United States v. Jones, 663 F.2d 567, 571 (5th Cir. 1981)

LIMITATIONS OF RULE

Rule 106, Fed. R. Evid.

1. Rule 106 does *not* require [authorize] introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages:

United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)

United States v. McCorkle, 511 F.2d 482 (7th Cir.), *cert. denied*, 423 U.S. 826 (1975)

2. "This rule is circumscribed by two qualifications. The portions sought to be admitted (1) must be relevant to the issues and (2) only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted":

United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981)

United States v. Crosby, 713 F.2d 1066, 1074 (5th Cir.), *cert. denied*, 104 S. Ct. 506 (1983)

EXAMPLES

Rule 106, Fed. R. Evid.

1. *Depositions*: can insist on admission of "related" portions of deposition at same time party offers a different portion.
2. *Letter Introduced*: admission at same time of reply to letter, or letter causing reply, if "ought in fairness," etc.

3. *Document with attachments and only document offered:* can require admission of attachments.
4. *NOTE:* Not limited to document offered -- may be "any other document" if it should in fairness be considered contemporaneously with the admitted document.

TIME OF ADMISSION

ADVERSE PARTY CHOICE

Rule 106 Fed. R. Evid.

1. Adverse party can develop matter on cross-examination or as part of the case if he so chooses.
2. Tactics and nature of document offered will determine course to follow.
3. *Consider:* Delay until cross-exam -- make witness and opponent look bad -- Immediate correction -- friendly witness being badgered.

REFRESHING MEMORY

Rule 612, Fed. R. Evid.

WRITING USED TO REFRESH MEMORY

1. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code:
 - A. If a witness uses a writing to refresh his memory for the purpose of testifying, either --
 - i. while testifying, or
 - ii. *before testifying*, if the court in its *discretion* determines it is necessary in the interests of justice,
 - B. an adverse party is entitled to have the writing produced at the hearing, to *inspect* it, to *cross-examine* the witness thereon, and to *introduce in evidence* those portions which relate to the testimony of the witness"

STEPS IN REFRESHING

RECOLLECTION

Rule 612, Fed. R. Evid.

1. Exhaust memory of witness -- can't recall fact or event.
2. Leading questions to a limited extent only -- to revive memory (if Court permits).
3. Have document marked for identification (not required in all courts).

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4. Show document to witness.
5. Witness silently reads document and then puts it aside.
6. Testifies as to recollection revived -- not from document.

***CAN USE ANYTHING TO
REFRESH RECOLLECTION?***

1. Can refresh recollection with "a song, a scent, a photograph, an allusion, even a past statement known to be false":

United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 67 S. Ct. 591 (1947)

2. BUT compare -- agents memorandum of interview can be used to refresh recollection of witness only if foundation laid that memorandum on its face reflects the witness's statement, or acknowledged that it does by the witness, and *court is satisfied it may be of help in refreshing recollection*.

United States v. Shoupe, 548 F.2d 636, 640 (6th Cir. 1977)

3. "When there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witnesses' memory is inadmissible."

United States v. Scott, 701 F.2d 1340, 1346 (11th Cir. 1983) (credit card applications held inadmissible because government had failed to disclose them to defense counsel pursuant to Rule 16, Fed. R. Crim. P., but applications could be used by government to refresh recollection of witness)

4. "The fact that a government agent instead of the witness prepared the statement is inconsequential." BUT: the trial judge has a duty to prevent a witness from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection:

Thompson v. United States, 342 F.2d 137, 140 (5th Cir.), *cert. denied*, 85 S. Ct. 1560 (1965)

5. Use discretion in selecting material used to refresh recollection.

***MECHANICS -- REFRESHING RECOLLECTION
Rule 612, Fed. R. Evid.***

- Q. How much did you pay for the boat?
- A. I can't remember, at this time.
- Q. Do you know of anything that will help refresh your recollection?
- A. Yes, I made some notes when I bought the boat.

Q. Do you have the notes with you.

A. Yes.

[Obtain notes and mark for Identification as Gov. Ex. ____]

Q. Let me show you Gov. Ex. _____. Read it to yourself and then put the document aside . . .

Q. Do you now remember what you paid for the boat?

A. Yes.

Q. How much did you pay?

PARTY REFRESHING RECOLLECTION

CAN'T READ STATEMENT TO JURY

Rule 612, Fed. R. Evid.

1. Can't read statement to witness under guise of refreshing recollection.
2. Witness must testify from revived memory, not from statement.
3. Witness *must* read document to herself:

Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967) ("but to read the statement aloud for refreshing recollection to the witness, hostile or not, is patent error")

United States v. Hicks, 420 F.2d 814, 816 (5th Cir. 1970)

Gaines v. United States, 349 F.2d 190, 192 (D.C. Cir. 1965)

4. Lengthy matter, accounting matters, etc., then court has discretion to permit witness to consult the writing as she testifies:

Goings v. United States, 377 F.2d 753, 761 n. 11 (8th Cir. 1967), appeal after remand, 393 F.2d 884 (1968) -- "The trial court in many instances should liberally allow a witness to refer to records, accounting sheets, and reports in testifying. Generally, doctors, lawyers, accountants and other lay witnesses testifying should be allowed continuously to refer to data on their reports, etc."

OBJECTION TO IMPROPER PROCEDURE

Rule 103(c), Fed. R. Evid.

1. Procedure used in refreshing recollection should be conducted as provided in Rule 103(c), Fed. R. Evid.:

(c) Hearing of Jury. -- In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

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2. Use Rule 103(c) any time opponent seeks to suggest inadmissible evidence to jury via improper remarks, questions, etc.
3. BUT note: leading questions can be used on preliminary or unsupported matters.

***ADVERSE PARTY CAN EXAMINE
AND INTRODUCE MEMORY AID
Rule 612, Fed. R. Evid.***

1. Absolute right to *examine document*.
2. Right to *cross-examine witness* on document.
3. *INTRODUCE in evidence* "those portions which relate to the testimony of the witness."
4. ONLY opposing party can put document in evidence:
Markel Service, Inc. v. National Farm Lines, 426 F.2d 1123, 1128 (10th Cir. 1970)
5. *Mechanics*: IF opposing party offers document, it should be marked as an exhibit of the opposing party.
6. NOTE: *COURT IN DISCRETION* can order material produced that was used to refresh recollection *BEFORE TESTIFYING*.

***CAVEAT -- JURY INSTRUCTION
Rule 612, Fed. R. Evid.***

1. Should have limiting instruction that memory aid can be used by jury only to judge credibility of witness -- to see what witness relied on.

***HEARSAY EXCEPTIONS
Past Recollection Recorded
Rule 803(5), Fed. R. Evid.***

1. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

803(5) *Recorded recollection* -- A memorandum or record concerning a matter about which a witness once had knowledge but now has ***INSUFFICIENT RECOLLECTION TO ENABLE HIM TO TESTIFY FULLY AND ACCURATELY***, shown to have been made or adopted by the witness when the *matter was fresh in his memory* and to reflect that knowledge correctly. If admitted, the memorandum or record *may be read into evidence* but may not itself be received as an exhibit unless offered by an adverse party. [Emphasis supplied]

DISTINGUISH

1. *REFRESHING COLLECTION* -- Rule 612 -- *Witness testifies.*
2. *PAST RECOLLECTION RECORDED* -- Rule 803(5) -- *Document Testifies.*

WITNESS FORGETS ON STAND -- "INSUFFICIENT RECOLLECTION"

Rule 803(5), Fed. R. Evid.

1. Previously had to pretty much show a complete failure of memory.
2. Now it is enough to show: "*INSUFFICIENT [PRESENT] RECOLLECTION TO ENABLE THE WITNESS TO TESTIFY FULLY AND ACCURATELY.*"
3. More liberal but foundation must still be laid that witness is unable to remember essential matter -- *that he knew at the time:*

United States v. Edwards, 539 F.2d 689, 691-92 (9th Cir.), *cert. denied*, 429 U.S. 984 (1976)
4. *Note:* witness might remember part but not all of a matter, then would seem only forgotten part of memorandum could be read to jury.
5. Refreshing recollection can be preliminary step to reaching past recollection doctrine -- BUT subject to Rule 103(c) limitations.

MEMORANDUM OR RECORD OF MATTER

Rule 803(5), Fed. R. Evid.

1. Must lay foundation that witness had knowledge of matter at one time -- personal firsthand knowledge.
2. Memorandum is a *substitute for present memory*.
3. Memorandum or record must be *made or adopted* by the witness -- one with personal firsthand knowledge:
 - A. *Made by witness* -- no problem
 - B. *Adopted memo* -- must show that witness examined memo and found it to be accurate:

United States v. Williams, 571 F.2d 344, 348 (6th Cir. 1978) (statement written by agent and signed by witness)
 - C. *Multiple participants* -- employer dictating to secretary or secretary making memorandum at direction of employer -- covered by rule

S. Report 93-1277, 12 U.S. Code Congressional & Administrative News, p. 63

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H. Report 93-650, 12 U.S. Code Congressional & Administrative News, p. 77

4. *Contemporaneous memo* -- made when matter was fresh in memory:
 - A. Requirement that memorandum be contemporaneous in the sense that it was made or *adopted* while matter was fresh in memory of witness
 - B. Less strict than requirement that memo be made "at or near the time of the recorded event"
 - C. But necessary part of foundation is to show that memo was made when witness would still have reason to remember
5. *Reflects knowledge correctly*:
 - A. Rule does not change case law
 - B. Witness must recognize memo as being true and accurate
 - C. Sufficient if witness testifies he remembers correctly recording the facts, or
 - D. Belief that witness would not have signed or written memo if it was not true
 - E. Habit and practice to record event as part of a business duty -- but not necessary to lay shop book rule foundation.

Ettelson v. Metropolitan Life Ins. Co., 164 F.2d 660, 667 (3d Cir. 1947)

6. *Grand jury testimony* -- proper foundation then pertinent portions of grand jury testimony can be read to jury as a past-recorded recollection exception to the hearsay rule:

United States v. Patterson, 678 F.2d 774, 777 (9th Cir. 1982)

MEMORANDUM -- AS EVIDENCE

Rule 803(5), Fed. R. Evid.

1. Proponent -- memorandum can be read to the jury.
2. ***BUT ONLY ADVERSE PARTY CAN MOVE ADMISSION OF MEMORANDUM INTO EVIDENCE:***

See confusing and incomplete discussion in ***United States v. Civella***, 666 F.2d 1122 (6th Cir. 1981) -- seems to overlook admission only by adverse party or else court relied on wrong rule

3. Practical point -- jury does not see memorandum unless adverse party wants it in evidence
4. Case law is to the contrary so this is a change:

Papalia v. United States, 243 F.2d 437 (5th Cir. 1957)

SUMMARIES AND SCHEDULES

SUMMARIES -- GENERALLY

1. Summaries constantly used in tax cases.
2. Distinguish -- although courts sometimes do not:
 - A. Summary based on documents in evidence
 - B. Summary of documents *NOT* produced in court -- Rule 1006, Fed. R. Evid.:

United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

SUMMARY OF EVIDENCE

1. Situation -- numerous deposit slips, checks, invoices, receipts *admitted into evidence*.
2. Summaries of evidence already admitted into evidence are merely pedagogical devices, which should be used only as a testimonial aid, and should not be admitted into evidence:

United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

3. However, several circuits allow a summary of evidence to be put before the jury with proper limiting instructions:

United States v. Mohnney, 949 F.2d 1397, 1405 (6th Cir. 1991)

4. Case law -- extensive records in evidence can be summarized in a chart, schedule, etc., based on the evidence:

United States v. Prevatt, 526 F.2d 400, 404 (5th Cir.), *reh. denied*, 531 F.2d 575 (1976)

United States v. Pollack, 417 F.2d 240, 241 (5th Cir. 1969), *cert. denied*, 397 U.S. 917 (1970) (summaries prepared by an accountant of various complex transactions were admissible)

United States v. Bartone, 400 F.2d 459, 461 (6th Cir.), *cert. denied*, 393 U.S. 1027 (1969) (Court should examine proposed summaries and charts prior to admission and advise jury that a summary is not evidence)

United States v. Cooper, 464 F.2d 648, 656 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (summary of extensive bank records, accounting machine tapes, debt and audit slips and loan papers by F.B.I. agent)

United States v. Kaatz, 705 F.2d 1237, 1245 (10th Cir. 1983) (specific items case and charts introduced summarizing 2,300 governmental exhibits; "summaries may properly be put before a jury with limiting instructions")

United States v. Evans, 910 F.2d 790, 801 (11th Cir. 1990) (admitted chart summarizing sixty \$100 payments per month that defendant received over a five year period)

BUT compare, *United States v. Collins*, 596 F.2d 166, 169 (6th Cir. 1979) (summaries straightforward and clearly based on evidence then not required that judge conduct a hearing outside presence of jury before admitting summaries)

5. Summary charts must be based on evidence and fairly represent and summarize the evidence upon which they are based:

United States v. Sorrentino, 726 F.2d 876, 884 (1st Cir. 1984) ("well established that summary exhibits such as net worth schedules" are admissible for the convenience of the jury but purported summaries not supported by the evidence are not admissible)

United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956)

United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

United States v. Keltner, 675 F.2d 602, 606 (4th Cir.), *cert. denied*, 459 U.S. 832 (1982)

United States v. Price, 722 F.2d 88, 91 (5th Cir. 1983)

Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971)

United States v. Wood, 943 F.2d 1048, 1054 (9th Cir. 1991)

Oertle v. United States, 370 F.2d 719, 727-28 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967)

6. *Principle*: Aids jury in understanding, *e.g.*, summary of deposits reflecting monthly total of bank deposits, summary of loans made, properties sold, etc.

SUMMARY TESTIMONY

1. The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions:

United States v. Moore, 923 F.2d 910 (1st Cir. 1991)

United States v. Sutherland, 929 F.2d 765 (1st Cir. 1991)

United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

2. Summary testimony in criminal trials is allowed when:
 - A. The Court charges the jury as to all the elements necessary for conviction
 - B. The summary is intended to aid the jury in organizing proof
 - C. The summary is not inflammatory or prejudicially worded

United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

United States v. Benson, 941 F.2d 598, 605 (7th Cir. 1991)

NET WORTH/EXPENDITURE CASES
GOVERNMENT CONTENTIONS

1. Distinguish net worth and expenditure computations -- must be based on evidence BUT computation reflects only government contentions -- a summary of evidence tending to prove guilt; a summary of government contentions:

United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)

United States v. Lawhon, 499 F.2d 352, 357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975)

Barsky v. United States, 339 F.2d 180, 181 (9th Cir. 1964)

2. "The nature of a summary witness' testimony requires that he draw conclusions from the evidence presented at trial":

United States v. Esser, 520 F.2d 213, 218 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

SUMMARY OF RECORDS
NOT IN EVIDENCE
Rule 1006, Fed. R. Evid.

1. *Case law*: voluminous records, summary admissible, not always necessary to produce records where available to defense:

Hecht v. United States, 393 U.S. 1082 (1969)

United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

United States v. Paxton, 403 F.2d 631, 632 (3d Cir. 1968), *cert. denied sub nom. Hecht v. United States*, 393 U.S. 1052 (1969)

United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

Stevens v. United States, 206 F.2d 64, 67 (6th Cir. 1953)

United States v. Cummings, 468 F.2d 274, 279 (9th Cir. 1972)

2. Now expressly provided for in Rule 1006.
3. **Rule 1006 Summaries, Fed. R. Evid.:**
 - A. "[V]oluminous writings, recordings or photographs which cannot conveniently be examined in Court."
 - B. "[M]ay be presented in the form of a chart, summary or calculation."
 - C. "*The originals or duplicates shall be available* for examination or copying, or both, by other parties at reasonable time and place."
 - D. Court "*may order*" production in court of documents summarized
 - E. *Practical point:* may be necessary *for government* to obtain agreement or court order providing for examination of records by defense
4. *Rule of reason* -- cannot use rule as an excuse for not producing records where records are not voluminous and could be conveniently examined in court:

Javelin Investment, S.A. v. Municipality of Ponce, 645 F.2d 92, 96 (1st Cir. 1981) (ten pages of records not the type of voluminous writings which cannot be conveniently examined in court)

United States v. Scales, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979) (BUT note that court at one point confuses rule that summaries of voluminous documents in evidence are admissible with Rule 1006 pertaining to documents not in evidence)

SUMMARY OF DOCUMENTS ONLY --

NOT TESTIMONY

Rule 1006, Fed. R. Evid.

1. Rule 1006 applies only to admission of summaries of voluminous documentary evidence.
2. Rule 1006 does *not* provide for the admission of summaries of the testimony of out-of-court witnesses:

United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

United States v. Goss, 650 F.2d 1336, 1344 n.4 (5th Cir. 1981) (agent's testimony that checks mailed based on out-of-court interviews, prior testimony of witnesses, and information on face of checks, was hearsay)

ADMISSIBLE EVIDENCE ONLY

Rule 1006, Fed. R. Evid.

1. Summary must be based on evidence; or on evidence that is otherwise admissible -- must lay foundation for authenticity and admissibility of records being summarized that are not produced:

United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171, 1175 (8th Cir. 1981)
(summary drawn from inadmissible data is not admissible)

United States v. Johnson, 594 F.2d 1253 (9th Cir. 1979) (mail fraud conviction reversed -- no showing that underlying records were admissible -- not enough that defense given notice that records would be used)

2. *Recording of telephone calls* -- Government expert's calculations of gross revenue of a gambling operation admitted in lieu of playing to jury tapes of 3,000 phone calls:

United States v. Clements, 588 F.2d 1030, 1038 (5th Cir. 1979) (unnecessarily time - consuming to play the tapes of all 3000 calls, calculation admissible under Rule 1006)

PREPARATION OF SUMMARY

Rule 1006, Fed. R. Evid.

1. Summary prepared under direction and control of witness is enough, not necessary for everyone who worked on summary to testify:

United States v. Mortimer, 118 F.2d 266, 269 (2d Cir.), *cert. denied*, 314 U.S. 616 (1941)

United States v. Scales, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979)

Diamond Shamrock Corp. v. Lumbermans Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972) (not necessary that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand)

2. Agent will testify that summary prepared under his/her direction and control; that agent reviewed and adopted the work

RULE 1006 SUMMARIES

ARE EVIDENCE

1. Summaries of evidence introduced in court then judge will instruct jury that the underlying exhibits are the evidence -- *not* the summary.
2. BUT under Rule 1006 there are no exhibits in evidence and the summary itself is evidence:

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United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977)

Federal Judicial Center Committee to Study Criminal Jury Instructions, *Pattern Criminal Jury Instructions* (Federal Judicial Center 1982), 8. Summaries of Records as Evidence, p. 13

POINTS TO NOTE

PRIOR INCONSISTENT

STATEMENT AT PRIOR PROCEEDING

Rule 801(d)(1)(A)

1. Witness on stand subject to cross-examination then prior inconsistent statement under oath at a trial hearing or other proceeding, or in a deposition, is NOT HEARSAY and is substantive evidence of guilt:

A. Rule 801(d)(1)(A)

B. *United States v. Woods*, 613 F.2d 629, 637 (6th Cir. 1980), and cases cited

2. N.B. Substantive evidence -- *not* merely impeaching:

United States v. Plum, 558 F.2d 568, 575-76 (10th Cir. 1977)

GRAND JURY TESTIMONY

Rule 801(d)(1)(A)

1. "It is well established that testimony before a grand jury constitutes 'other proceedings' within the rule [801(d)(1)(A)]":

A. *United States v. Long Soldier*, 562 F.2d 601, 605 (8th Cir. 1977)

B. Conference Report No. 93-1597, 1974 U.S. Code & Admin. News, p. 7104

2. Testimony at trial inconsistent with grand jury testimony -- grand jury testimony can be introduced as substantive evidence:

United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

United States v. Blitz, 533 F.2d 1329, 1344-45 (2d Cir. 1976)

United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975)

United States v. Dennis, 625 F.2d 782 (8th Cir. 1980) -- that statements elicited by means of leading questions does not affect eligibility under Rule 801(d)(1)(A)

United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977) (statement before a grand jury is a statement given at a trial, hearing or other proceeding within the meaning of Rule 801(d)(1)(A))

United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977)

3. Extracts of grand jury transcript itself can be made an exhibit and introduced into evidence -- discretionary with trial judge:

United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

***PRIOR INCONSISTENT STATEMENT
NOT IN PRIOR PROCEEDING/UNDER OATH
Rules 607 and 613, Fed. R. Evid.***

1. Does not come under Rule 801(d)(1)(A).
2. Prior inconsistent statement not at a prior proceeding and not under oath still can be admissible to attack credibility -- Rules 607, 613.
3. BUT impeaching only -- *not substantive evidence*:

United States v. Harris, 523 F.2d 172, 175 (6th Cir. 1975)

United States v. Ragghianti, 560 F.2d 1376, 1379-81 (9th Cir. 1977) (failure to instruct jury that testimony was impeaching only was reversible error)

***IMPEACHING YOUR OWN WITNESS
Rule 607, Fed. R. Evid.***

1. "The credibility of a witness may be attacked by any party, including the party calling him." Rule 607, Fed. R. Evid.
2. Eliminates the old voucher rule.
3. No showing of surprise necessary:

United States v. Palacios, 556 F.2d 1359, 1363 (5th Cir. 1977) (under Rule 607 impeachment is proper without a showing of surprise)

United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977)

4. BUT surprise can still be a factor in supporting introduction of impeaching evidence.
5. You can't call a witness just so you can impeach him and then call impeaching witness so as to get in testimony otherwise inadmissible.

6. See discussion in *United States v. Morlang*, 531 F.2d 183, 188 (4th Cir. 1975) ("never been the rule that a party may call a witness where his testimony is known to be adverse for the purpose of impeaching him.")

EVIDENCE THAT A WITNESS

IS NOT TO BE BELIEVED

Rule 608(a), Fed. R. Evid.

1. Credibility of a witness may be attacked by evidence in the form of either: (1) opinion or (2) reputation -- Rule 608(a), Fed. R. Evid.
2. Defense calls witness who testifies that he loaned defendant money, or he gave the defendant money as a gift, or that the defendant was not a partner, or any testimony to exculpate the defendant.
3. You have a witness who knows the defense witness well and/or knows her reputation for truth and veracity. Your witness tells you that the defense witness is a liar.
4. You can call your witness and develop testimony that:
 - A. In her *opinion* the defense witness (the defendant if he was the witness) is not truthful and she would not believe him under oath, or
 - B. The *reputation* of the defense witness (or the defendant if he has introduced character evidence) for truthfulness or untruthfulness is bad
5. See the following cases:

United States v. Lollar, 606 F.2d 587, 588-89 (5th Cir. 1979) (defendant testified and his employer testified that he would not believe him under oath)

United States v. Walker, 313 F.2d 236, 239 (6th Cir. 1963) (defendant testified, government called two police officers on rebuttal who testified that the defendant's reputation for truth and veracity was bad)

United States v. Bambulas, 471 F.2d 501, 504 (7th Cir. 1972) (Would you believe the witness under oath? is a proper question)

Hodge v. United States, 414 F.2d 1040, 1044 (9th Cir. 1969) (testimony as to defendant's veracity is admissible once the defendant takes the stand)

United States v. Thomas, 676 F.2d 531, 535 (11th Cir. 1982) (impeachment is "not dependent upon the defendant's introduction of good character evidence")
6. See discussion in *United States v. Watson*, 669 F.2d 1374, 1381 (11th Cir. 1982) -- note difference in foundation depending on whether reputation or opinion testimony is to be offered.

7. *Caution:* general rule is prosecution may *not* introduce evidence of the bad character of the defendant unless and until the defendant presents evidence of good character, Rule 404(a), Fed. R. Evid.

United States v. Hewitt, 634 F.2d 277, 278 (5th Cir. 1981)

8. *Conversely:* defendant may always present evidence of pertinent traits of character but the door is then open to cross-examination and rebuttal on those traits whether the defendant takes the stand or not, *Hewitt*, 634 F.2d at 278

BAD ACTS -- NO

CONVICTION

Rule 608(b), Fed. R. Evid.

1. Can attack credibility of a witness (or defendant) by cross-examining as to specific instances of misconduct going to truthfulness or untruthfulness.
2. Not necessary that conduct led to a conviction -- only requirement is that conduct be probative of truthfulness, *i.e.*, that conduct involved dishonesty or false statement, Rules 608(b), 609(a)(2), Fed. R. Evid.:

United States v. Sperling, 726 F.2d 69, 75 (2d Cir. 1984) (proper for government to cross-examine defendant regarding his false credit card applications to show a general lack of credibility)

United States v. Reed, 700 F.2d 638, 643-44 (11th Cir. 1983) (embezzlement and unlawful possession and obstruction of mails conviction reversed, question and testimony as to use and possession of marijuana not admissible and highly prejudicial, does not shed any light on character for untruthfulness)

GOOD FAITH BASIS

1. Must have good basis for question -- may be required to disclose good faith basis to the court outside the jury's presence:

Michelson v. United States, 335 U.S. 469, 472, 481 (1948)

United States v. Bright, 588 F.2d 504, 511 (5th Cir. 1979) (must have good faith factual basis for incidents inquired about and incidents must be relevant to the character traits involved at the trial)

2. This is true of any question asked -- may explore area without full knowledge of answer but on demand must provide good faith basis for question alleging adverse facts:

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 704 (1984)

COLLATERAL MATTER

1. STUCK with answer of witness on a collateral matter -- extrinsic evidence is not admissible -- Rule 608(b).
2. *Collateral*: Matter generally is collateral if matter is relevant *only* to contradict the in-court testimony of the witness, a matter far afield from the main controversy.
3. *Not Collateral*: Matters that directly concern the general credibility of the witness such as bias, corruption, coercion, etc., and may be contradicted by other evidence.

DEFENDANT'S STATEMENTS

Rule 801(d)(2)(A), Fed. R. Evid.

1. *Admission*: statement of the defendant offered by the government to prove the truth of the matter asserted is *not* hearsay:
Rule 801(d)(2)(A), Fed. R. Evid.
2. Statement of the defendant offered by the government to show it was made and not to prove the truth of what the defendant said is *not* hearsay, *e.g.*, offered to show defendant made false statement to special agent from which jury could infer consciousness of guilt:
Anderson v. United States, 417 U.S. 211, 219-20 (1974) (point of prosecution in introducing statements was simply to prove they were made so as to establish a foundation for later showing that they were false)
Rule 801(c), Fed. R. Evid.
3. If defendant offers his own statement for the truth of the matter asserted, it is hearsay and it is not admissible:
United States v. Marin, 669 F.2d 73, 84 (2nd Cir. 1982)
4. BUT if defendant offers his own statement simply to show it was made rather than to establish the truth of the matter asserted, then it is not hearsay -- but the fact that the statement was made must be relevant to an issue in the case or else it is not admissible, *United States v. Marin*, 669 F.2d at 84.
5. *Note*: always consider the application of Rule 106 (Rule of Completeness) before you offer a defendant's statement.

***IMMUNITY AGREEMENT
BROUGHT OUT ON DIRECT***

Rule 607, Fed. R. Evid.

1. Chicago building inspection supervisors convicted of extortion through use of official positions and filing false income tax returns -- section 7206(1) -- extortion income not reported.
2. Government brought out on direct examination of three witnesses that the witnesses had been granted immunity.
3. Defendants objected that testimony was inadmissible because it was used to enhance the credibility of these witnesses rather than to impeach it.
4. *Held*: procedure approved -- Government introduced testimony for purposes of impeachment because it anticipated defense counsel would cross-examine on issue of immunity:

United States v. Hedman, 630 F.2d 1184, 1198 (7th Cir.), *cert. denied*, 450 U.S. 965 (1978)

5. "Nothing improper" if government questions witness about his understanding of the terms of the immunity order

United States v. Hedman, 630 F.2d at 1198

United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981) (non-statutory immunity, witness asked to describe immunity agreement)

United States v. Craig, 573 F.2d 513, 519 (7th Cir. 1978), *cert. denied*, 439 U.S. 820 (1981)

6. *Compare*: agreement by witness to cooperate with government is not admissible on direct; only admissible on re-direct following cross-examination attacking credibility of witness:

United States v. Barnes, 604 F.2d 121, 150 (2d Cir. 1979)

***IMPEACHMENT BY
CONVICTION ON NOLO PLEA***

Rule 609(a), Fed. R. Evid.

1. Conviction complying with provisions of Rule 609(a) can be used for impeachment.
2. Conviction on nolo plea of crime that comes within Rule 609 is admissible as impeachment:

United States v. Williams, 642 F.2d 136, 138 (5th Cir. 1981) -- "admitting a nolo conviction under Rule 609 is well founded"

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3. BUT you cannot prove that defendant admitted his guilt by a *nolo* plea even if there is a judgment of conviction -- plea is not admissible, Rule 410, Fed. R. Evid.

"Rule 609(a) permits proof of the conviction. Were it pertinent, however, the prosecutor could *not* prove that appellant had admitted his guilt by his plea. He did for the purpose of the case in which it was entered, but for all other purposes he preserved his denial." *Williams*, 642 F.2d at 139 (underscoring supplied)

ARGUMENT

ARGUMENT -- GENERALLY

1. Argument folder:
 - A. Set up at outset of trial
 - B. During trial collect notes for argument -- yours, agents, audience, reporter, anyone who has an idea
2. Advise jury that what you say or what defense counsel says is not evidence.
3. *Never, never, never* say "I believe." Most you can say is: "I submit that the evidence is clear that" or "I suggest that"
4. Tell jury a story -- chronologically where possible.
5. Avoid or eliminate entirely -- Smith testified, Jones testified, etc.
6. Blend documents and testimony into your story.
 - A. Prepare chart of key documents and testimony in chronological order for your use
 - B. Will highlight the defendant's financial life
 - C. List will suggest approach to take
 - D. Often will show up dramatic contrasts
 - E. Points up "real life of defendant" for the jury

***EXAMPLE
CHART FOR PREPARING
ARGUMENT***

<i>DATE</i>	<i>DOCUMENT</i>	<i>EXHIBIT</i>
12/22/89	Suit for Husband - \$800	6
12/24/89	Deposit on 1990 Cadillac -- \$16,000	19
1/10/90	Monthly Payment on Swimming Pool -- \$1,125	27
2/15/90	Country Club Birthday Party - \$2,500 - 25 Guests	8
3/17/90	9:45 a.m. - \$9,500 Deposited in Bank - cash	14
3/31/90	Trip to Disneyland - \$3,000	32, 44
4/15/90	Trip to Switzerland - Passport	42
4/15/90	1989 Tax Return - Tax Due \$900	1

STYLE

1. Personalize argument, *e.g.*, instructions referred to in argument:

Suggest: His Honor will tell you

NOT: You will be instructed by the Court

2. Charts:

A. Useful in final argument

B. Keep as simple as possible -- less detail the better

C. Clear use of charts with judge ahead of time

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3. Round off figures and use totals rather than figures for individual years whenever possible:
 - A. *Case:* Defendant did not report \$20,512.00 in 1988, \$28,752.00 in 1989 and \$15,300 in 1990
 - B. *Convert to:* Defendant did not report over \$64,000; or for three years in a row the defendant signed her name to false returns -- false by over \$64,000
4. Ask for a guilty verdict

CONCLUSION

WE DO WIN WHEN JUSTICE IS DONE